

# THE MILITARY EXTRATERRITORIAL JURISDICTION ACT

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Strategy

by

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

## ABSTRACT

THE MILITARY EXTRATERRITORIAL JURISDICTION ACT, by LCDR Kathleen A. Kerrigan, 106 pages.

The Military Extraterritorial Jurisdiction Act (MEJA) is a critical statute for the future of the United States military and the American public. Its interpretation affects both national security and the rights of American citizens. This statute gives the United States judicial system the ability to exercise jurisdictional control overseas. No time in this nation's history has the United States government exercised such potential control over its citizens abroad. Critical issues regarding MEJA, especially the implementing of the Department of Defense Instruction (DoDI) remain unresolved. This thesis proposes a series of revisions to the DoDI in order to resolve ambiguities and misunderstandings. Furthermore, a case of first impression regarding the use of MEJA is also underway. This thesis analyzes it as well. In July 2004, this case of first impression will be prosecuted determining, once and for all, if the jurisdictional gap over Americans accompanying armed forces overseas has been resolved.

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## CHAPTER 1

### INTRODUCTION

For the last four decades, American civilians committing crimes overseas have had “get-out-of-jail free” cards. In fact, in the late 1950s, two female spouses murdered their military husbands at overseas military bases and just three years ago, a soldier’s husband impregnated her thirteen year-old daughter.<sup>1</sup> Unfortunately, none of these individuals were held criminally responsible for their actions.

Thus, until the enactment of the Military Extraterritorial Jurisdiction Act (MEJA) of 2000, the United States could not prosecute American citizens for felonies committed on foreign soil. However, the first case to fall under MEJA United States federal jurisdiction is now being prosecuted. On 27 May 2003, an American female civilian was turned over to United States marshals for allegedly killing her military husband. This military spouse, Mrs. Latasha Arnt, is the first American citizen to be formally charged under the MEJA.

Accordingly, this paper will analyze this new statute and examine whether it resolves the problem of jurisdiction over civilians committing crimes overseas. Next, the paper will examine the constitutional issues associated with the statute’s implementation. Third, it will also examine the enforcement of the statute, given that more civilians are accompanying armed forces overseas and are not under the direct supervisory control of military commanders. This issue is particularly significant when civilians commit crimes on overseas installations or in an operational theater. Fourth, this thesis will examine the potential implications and gaps in the proposed Department of Defense Instruction

(DoDI) implementing MEJA, including its applicability and scope, policy, definitional terms, responsibilities, and procedures.<sup>2</sup> Finally, the case of *United States v. Arnt* will be analyzed in conjunction with the DoDI to identify possible jurisdictional gaps.

### Literature Review and Research Design

Research into MEJA is significant because such research identifies potential loopholes that future defendants may use to avoid jurisdiction. Since no case has been adjudicated under the act, future challenges and possible constitutional arguments may leave a jurisdictional gap. With this research, I intend to discuss and analyze the first case to be prosecuted under the MEJA and examine how future jurisdictional problems may be avoided. Thus, this research will be beneficial to any reader who has to contend with the MEJA's provisions either directly, through execution of its requirements, or indirectly, as a commander responsible for civilians overseas.

After conducting a review of this topic, there is a sufficient amount of material to support the writing of this thesis. The reference list contained within this prospectus is the result of research conducted at the Combined Arms Research Library (CARL). The material already gathered will be used for the bulk of the historical and case law sections of the paper. However, the pending Department of Defense (DoD) service regulations detailing the requirements for enforcement of the act have yet to be officially promulgated.<sup>3</sup> Moreover, materials for the recent ongoing case of *United States v. Arnt* may be somewhat limited due to Privacy Act concerns.<sup>4</sup> Nonetheless, there is sufficient reference material available to support the development of this thesis project.

## History

Before analyzing the MEJA, the history and past issues that caused this act to be enacted must be reviewed. Congress enacted MEJA because in some circumstances, American citizens overseas were getting away with murder. It seems strange that the federal laws within the United States could not reach citizens abroad, but this in fact occurred. Specifically, the predecessor to the MEJA limited jurisdiction overseas to the “special maritime and territorial jurisdiction of the United States.”<sup>5</sup> This statute covered most crimes committed by civilians on the high seas and United States commonwealth territories. Specifically, it includes the following:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.<sup>6</sup>

Although this statute was enacted to cover criminal issues overseas, there were still significant gaps in its jurisdictional reach.<sup>7</sup> Only designated criminal offenses under Title 18 of the United States Code could be prosecuted by the United States.<sup>8</sup> These offenses included counterfeiting and forgery, money laundering, acts of terrorism, and drug trafficking, but only when committed within the “special maritime and territorial jurisdiction of the United States.”<sup>9</sup> The “special maritime and territorial jurisdiction of the United States” included the high seas and waters within the admiralty of the United States, United States flagged vessels, United States aircraft, and areas not under the jurisdiction of any other nation.<sup>10</sup> The United States’ extraterritorial jurisdiction under Title 18 did not extend to acts committed by United States civilian personnel in foreign countries.<sup>11</sup> As a result, American civilians were able to commit murder, rape, and sexual

assault overseas for the last forty years without any type of judicial punishment or consequence.<sup>12</sup>

In order to extend federal jurisdiction to cover most felonies, Congress passed several additional criminal statutes that applied within the “special maritime and territorial jurisdiction of the United States.”<sup>13</sup> However, these criminal statutes applied only on the high seas and other waters within the admiralty and maritime jurisdiction of the United States, on lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof, on federal lands within the United States, in United States aircraft flying overseas and in spacecraft.<sup>14</sup> Since 1952, Congress has passed five amendments to the original “special maritime and territorial jurisdiction of the United States” provision to expand and clarify United States jurisdiction.<sup>15</sup> Unfortunately, these amendments did not encompass overseas bases and other leased territories, causing American citizens in those locations to escape United States jurisdiction.

A glimpse of the U.S. Constitution<sup>16</sup> and the original Articles of War<sup>17</sup> provide a background on why such a hands-off approach to jurisdiction overseas existed until enactment of MEJA. The American public has had a history of distrust for military control:<sup>18</sup> “Since the writing of the Declaration of Independence, Americans have seen standing armies as instruments of oppression and tyranny.”<sup>19</sup> These sentiments stem from conflicts with England back in the late 1700s.<sup>20</sup> Even after achieving independence, Americans had a strong fear of military control. As a result, the United States system of justice has been very hesitant to extend jurisdiction overseas.

### Civilians Accompanying the Armed Forces

Historically, civilians served to the rear of the front lines. However, in recent conflicts, civilians increasingly work alongside military service members.<sup>21</sup> In fact, “civilians accompanying the Armed Forces include civilian government employees, civilian members of military aircraft crews, supply contract personnel, contractor technical representatives, war correspondents, and members of labor units or civilian services responsible for the welfare of the Armed Forces.”<sup>22</sup> Recent deployments to Somalia, Haiti, Rwanda, the Balkans, and elsewhere show that the role of civilians has increased dramatically.<sup>23</sup>

Today, there are several categories of civilians accompanying the armed forces including: (1) DoD civilian employees, (2) contractor personnel, (3) dependents of DoD civilian personnel, (4) dependents of contractor personnel, (5) dependents of military personnel, and (6) nonaffiliated civilians, such as the media, nongovernmental organizations, intergovernmental organizations, private volunteer organizations, international refugees, and stateless persons.<sup>24</sup> Since the participation of American civilians serving alongside U.S. armed forces has changed significantly, the occurrence of misconduct overseas has increased.<sup>25</sup> Joint Task Force Commanders now plan and execute operations to encompass METT-TC: mission, enemy, terrain, troops, time available, and civilians.<sup>26</sup> METT-TC refers to factors that are fundamental to assessing and visualizing the battlefield. The first five factors are not new.<sup>27</sup> However, the impact of nonmilitary factors on operations has caused commanders to include civilians within the equation.<sup>28</sup> Thus, civil considerations are now considered an essential part of the

Army transformation process. Today, civilians comprise a quarter of the total Army force and serve in over seventeen nations.<sup>29</sup>

Unfortunately, besides providing critical assistance to armed forces overseas, civilians are also committing crimes. For instance, an incident in Iraq involving illegal kickbacks shows that civilians can pose a serious threat: in January 2004, Halliburton, a U.S. company involved in the rebuilding and reconstruction of Iraq reported that two civilian employees were receiving up to \$6 million in return for their assistance in awarding a Kuwaiti-based company work to supply U.S. troops in Iraq.<sup>30</sup> Currently, this matter is under investigation and the company has fired the two employees.<sup>31</sup> In addition, a subsidiary of Halliburton, Kellogg Brown and Root, is also under investigation for overcharging fuel deliveries by more than \$61 million.<sup>32</sup> These offenses may fall under the MEJA since the act establishes federal criminal jurisdiction<sup>33</sup> over those individuals who engage in conduct outside the United States for offenses punishable by imprisonment for more than one-year.<sup>34</sup>

Between 1989 and 1999, the active duty force was reduced in size from 2,174,200 to 1,385,700, increasing the need for civilians overseas.<sup>35</sup> Although the number of United States military forces has dropped, operations have been increased with a need to deploy many more civilians.<sup>36</sup> In 1999, for example, there were 1200 Dyn Corp contractors who were involved in the peacekeeping operations in Angola, Africa. In Bosnia, the ratio of civilians to military was one to ten.<sup>37</sup> The General Accounting Office (GAO) estimated that 14,391 civilians deployed to the Middle East in support of Operations Desert Shield and Desert Storm and 45,900 civilians supported 6,000 uniform service members in Bosnia for Operation Joint Endeavor.<sup>38</sup> During the Gulf War, the

ratio of civilians to military was one out of every thirty-six.<sup>39</sup> As of April 2001, there were 669,000 civilian employees working overseas.<sup>40</sup>

This exercise of jurisdiction overseas has become even more significant with the large number of civilians that are accompanying forces to foreign nations. Even though American tourists and business persons are beyond the reach of U.S. jurisdiction, they do not have an immediate impact on military communities overseas.<sup>41</sup> Civilians who commit misconduct can affect the morale and welfare of troops because of the close community ties that the military and civilian population share.<sup>42</sup> In fact, the GAO has stated that the lack of U.S. criminal jurisdiction over civilians leads to serious morale and discipline problems in overseas military communities.<sup>43</sup>

Moreover, weapon systems and combat support systems are becoming increasingly complex.<sup>44</sup> The complexity of these platforms has also made it difficult for the military services to train and retain sufficient personnel.<sup>45</sup> As a result, civilian technicians are used both in the United States and overseas.<sup>46</sup> Some of these civilians are operating systems that are critically important to combat operations.<sup>47</sup> The absence of these systems could lead to American casualties.<sup>48</sup>

Today, there are numerous systems that require contractor and civilian support. For instance, the Joint Surveillance and Target Attack Radar System (JSTARS) and River Joint aircraft are two platforms that required contractor support in 1999 in support of Bosnia operations.<sup>49</sup> In fact, “Never has there been such reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement . . . the military is facing a fundamental change in the way it conducts warfare.”<sup>50</sup> Given these rapid changes and requirements, civilian employees have become paramount to the

success of the military mission and jurisdictional control over them is essential. Although Congress attempted to implement legislation bills over the last forty years, too many were overlooked and not seriously considered.<sup>51</sup> In fact, twenty-seven different bills were introduced in successive Congresses to close the jurisdictional gap over the past forty years.<sup>52</sup>

Finally, in 1995, the House of Representatives Overseas Judiciary Committee realized the serious problems that civilian criminal misconduct was causing overseas. An investigation into civilian crime committed on overseas bases such as Germany, Japan, and Korea indicated that criminal misconduct involving United States civilian employees, contractors, and family members was not being prosecuted by either the host nation or the United States.<sup>53</sup> As a result, this misconduct was causing good order and discipline problems for commanders overseas because they did not have the same discipline standards for military members and civilians.<sup>54</sup> Thus, the overseas military community, the United States mission, and the political relationships with foreign nations were all being threatened.<sup>55</sup>

Because of this problem, the commanders of forces in Korea, Japan, and Germany voiced their concerns as part of an investigation.<sup>56</sup> Their concerns resulted in the establishment of the Overseas Jurisdictional Advisory Committee in 1996 as a joint effort of the Secretary of Defense and the Attorney General.<sup>57</sup> The Committee was tasked with the following: to review historical experiences and current practices concerning the use, training, discipline, and functions of civilians accompanying the armed forces in the field; to develop specific recommendations concerning the advisability and feasibility of establishing United States criminal jurisdiction over civilians accompanying the armed

forces in the field outside the United States during time of armed conflict not involving a war declared by Congress; and to develop other recommendations as the Committee considered appropriate.<sup>58</sup> In addition to reviewing the issue of the exercise of criminal jurisdiction over civilians accompanying the armed forces overseas during armed conflict, the Committee also examined the exercise of jurisdiction over DoD civilian employees and military family members overseas during routine assignments as well as deployment situations.<sup>59</sup>

In response to the Overseas Jurisdictional Advisory Committee's request for information, Admiral Tobin, Commander, U.S. Naval Forces, Japan, indicated his inability to deal adequately with serious civilian offenses, as a "significant and long standing" problem.<sup>60</sup> He stated that the "lack of jurisdiction leaves overseas commanders and their communities without any legal deterrent or protection from criminal activity."<sup>61</sup> As a result, the Overseas Jurisdictional Advisory Committee recommended that the future conduct of civilians overseas be controlled through legislation, the Uniform Code of Military Justice (UCMJ), or both.<sup>62</sup> Congress enacted the MEJA as part of the solution to this lack of jurisdictional control.

#### History of Military Jurisdiction Over Civilians Accompanying the Armed Forces

From 1775 through 1949, the United States military exercised jurisdiction over civilians through the Articles of War.<sup>63</sup> Since the Revolutionary War, citizens have been subject to prosecution by court-martial.<sup>64</sup> In fact, Congress expanded the Articles of War in 1916 to permit court-martial jurisdiction over all civilians accompanying the armed forces outside the territorial jurisdiction of the United States.<sup>65</sup> The government used these provisions during World Wars I and II to ensure that civilians were held

accountable for their misconduct. However, the courts limited the scope of jurisdiction to violations that civilians committed “in the field.”<sup>66</sup>

When the UCMJ was enacted in 1950<sup>67</sup> and replaced the Articles of War, three provisions authorized the use of courts-martial to try civilians for offenses that violated the code, although they largely duplicated the 1916 Articles of War provisions concerning jurisdiction over civilians.<sup>68</sup> Specifically, Article 2(a) of the UCMJ states that during the following situations, civilians will be subject to the UCMJ:

(10) In time of war, persons serving with or accompanying an armed force in the field;

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with or employed by or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands;

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.<sup>69</sup>

In the late 1950s, the U.S. Supreme Court began to significantly limit the application of these new provisions. First, in 1955, in the case of *Toth v. Quarles*, the Supreme Court ruled that the military could not prosecute Robert Toth under the UCMJ because he was no longer part of the military.<sup>70</sup> In this case, the Court examined Article I of the Constitution that granted Congress the power “to make Rules for the Government and Regulation of the land and naval Forces.”<sup>71</sup> The Supreme Court determined that Article I restricted court-martial jurisdiction to individuals who were actually members of the Armed Forces.<sup>72</sup> Since Toth had already been discharged, he was a civilian and no longer fell under the UCMJ. As a result, the Supreme Court’s ruling allowed Toth to

escape prosecution for the alleged murder of a Korean national. This case was the first to indicate a jurisdictional gap in the United States government's ability to prosecute crimes overseas.<sup>73</sup>

In 1957, another Supreme Court case, *Reid v. Covert* found a wider jurisdictional gap.<sup>74</sup> In this case, the Supreme Court held that the UCMJ Article 2(a)(11) was unconstitutional as applied to civilians during peacetime.<sup>75</sup> The Court held that “the court-martial of the wife of a service member stationed overseas in peacetime was unconstitutional, because a court-martial could not guarantee fundamental rights, including indictment by grand jury, jury trial, and the other protections contained in the Fifth, Sixth, and Eighth Amendments.”<sup>76</sup> The Court reasoned that “American civilians do not give up these fundamental rights simply because they accompany their military family members overseas.”<sup>77</sup> In *Reid*, the wife of an Air Force sergeant was tried by a military court-martial for the murder of her husband in England. While awaiting trial, she filed a petition for writ of habeas corpus, alleging that she was not subject to court-martial jurisdiction because of the unconstitutionality of Article 2(a)(11) of the UCMJ.<sup>78</sup> This case proceeded to the Supreme Court where her conviction was set aside.

At about the same time, the Supreme Court heard the case of *Kinsella v. Krueger*.<sup>79</sup> In that case, Krueger accompanied her husband, an Air Force Colonel, to Japan. While overseas, Krueger was convicted of the premeditated murder of her husband by an American court-martial in Tokyo, Japan.<sup>80</sup> She was found guilty and was sentenced to life in prison. While she was serving her sentence, her father filed a writ of habeas corpus alleging that the court-martial had no jurisdiction to try her.<sup>81</sup> The writ claimed that Article 2(a)(11) of the UCMJ violated both Article III § 2 and the Sixth

Amendment of the U.S. Constitution, which guarantees the right to trial by jury to a civilian.<sup>82</sup> Here, the U.S. Supreme Court stated that the Mrs. Krueger's trial did not meet the requirements of the U.S. Constitution.<sup>83</sup> In addition, the Court stated that U.S. Constitution Article I, § 8 cl. 14 did not include civilians because they were not technically in the military service.<sup>84</sup> As the wife of a service member, Mrs. Krueger could not fairly be said to be in the military. Moreover, she did not lose her civilian status just because the government helped her live as a member of a soldier's family.<sup>85</sup> Lastly, the Supreme Court stated that it should not depart from the nation's tradition of keeping military power subservient to civilian authority, a tradition that is firmly embodied in the Constitution.<sup>86</sup> Together, *Toth* and *Krueger* established a precedent that court-martials had no jurisdiction over civilians that would endure for the next 30 years.

The trend of finding no court-martial jurisdiction over civilians continued with the case of *United States v. Averette* in 1970.<sup>87</sup> Averette was a civilian contractor who was convicted of larceny at a court-martial while stationed in Vietnam.<sup>88</sup> He appealed the conviction, challenging the constitutionality of the Army's exercise of Article 2(a)(10) jurisdiction over him.<sup>89</sup> The Court of Appeals for the Armed Forces (CAAF) strictly construed the definition of "in time of war" and held that the court-martial lacked jurisdiction because Congress had never formally declared war in Vietnam.<sup>90</sup> As a result, Averette escaped United States jurisdiction and his crime went unpunished.

In 2000, in the case of *United States v. Corey*, an American citizen living abroad also avoided prosecution. According to the facts, Corey had worked as a civilian postmaster for the United States Air Force. He and his family lived in an apartment building rented by the American Embassy. While living in Japan, Corey's stepdaughter

reported to her doctor that she had been forced to engage in sexual intercourse with him for the previous five years. After an investigation, Corey was charged with aggravated sexual abuse and sexual abuse in violation of 18 U.S.C. § 2241(a) and § 2242(1).<sup>91</sup> The first trial ended in a hung jury, but the second trial found him guilty on eight of the eleven counts and sentenced him to 262 months in prison.<sup>92</sup> Soon after, the defendant appealed on the ground of improper jurisdiction.

Here, the Ninth Circuit ruled on the issue of whether the “special maritime and territorial jurisdiction of the United States” included lands within the territory of a foreign nation. It determined the issue through statutory interpretation and stated that it would be logical to presume that Congress did want to extend its jurisdiction.<sup>93</sup> In fact, the Court stated that “construing subsection 7(3) as applying only to federal lands within the United States serves neither Congressional intent nor American foreign policy. All it does is hand a “get-out-of-jail-free” card to American civilians who violate United States law while stationed abroad.”<sup>94</sup> As a result, *Corey* ruled that the Air Force base and apartment building fell within the “special maritime and territorial jurisdiction of the United States.”<sup>95</sup> This was one of the first cases where the United States exercised its jurisdiction.

The most recent case of *United States v. Gatlin* explains why the enactment of the MEJA was so essential.<sup>96</sup> In *Gatlin*, a spouse of a female service member stationed in Germany pled guilty to sexually assaulting his thirteen-year-old stepdaughter.<sup>97</sup> The offense was not discovered until the pregnant girl returned to the United States, where it was determined that Gatlin was the father of the thirteen-year-old girl’s child. Gatlin was found guilty of sexually abusing a minor while “within the special maritime and

territorial jurisdiction of the United States”, a violation of 18 U.S.C. § 2243(a).<sup>98</sup> The U.S. Court of Appeals for the Second Circuit overturned his conviction.<sup>99</sup> Here, the Second Circuit ruled that the District Court lacked jurisdiction over Gatlin’s crime because it was committed on a United States military installation in the Federal Republic of Germany.<sup>100</sup> Specifically, the Second Circuit stated that the statute that Gatlin pled guilty to, 18 U.S.C. § 2243(a), did not apply to his acts because they did not occur within the jurisdiction of the “special maritime and territorial jurisdiction” of the United States under 18 U.S.C. § 7.<sup>101</sup> The Judges were so troubled by this outcome that the presiding Judge ordered the Clerk of the court to deliver a copy of the opinion to both Chairmen of the Senate and House Armed Services and Judiciary Committees.<sup>102</sup>

Since the late 1950s, the courts have limited the exercise of federal criminal jurisdiction over civilians accompanying the armed forces overseas. With the cases of *Toth v. Quarles*, *Reid v. Covert*, *Kinsella v. Krueger*, *United States v. Averette*, and *United States v. Gatlin*, the Supreme Court has still not been able to eliminate this jurisdictional gap. As a result, many civilians have escaped prosecution for murder, rape, and sexual assault.

In 2000, Congress enacted the MEJA to eliminate this jurisdictional gap and to hold civilians accountable for these heinous crimes. With the turn of the century, the first case to succumb to the MEJA is currently in progress. Thus, the outcome of *United States v. Arnt* will determine if the statute can truly bridge these gaps.<sup>103</sup> Through an analysis of the Department of Defense Instruction (DoDI), the MEJA, and *Arnt*, this thesis will determine if MEJA has closed the jurisdictional gap as Congress intended. Specifically, the following chapter will outline the MEJA, discuss potentially problematic

sections of the DoDI, and make recommendations for its appropriate implementation. In addition, the *United States v. Arnt* case will be evaluated in accordance with the MEJA and the DoDI. Since the outcome of this case will not be determined during the time period of this thesis, most comments and opinions will be based on detailed assumptions. This case will determine the future of the MEJA and more importantly, whether civilians will be able to escape prosecution for felonies overseas.

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<sup>1</sup> *United States v. Gatlin*, 216 F.3d 207 (2nd Cir. 2000).

<sup>2</sup> Extraterritorial Federal Criminal Jurisdiction Over Current and Former Members of the Armed Forces and Civilians Employed By or Accompanying the Armed Forces, 69 Fed. Reg. 4890 (2004) (to be codified at 32 C.F.R. pt. 153) (proposed Feb. 2, 2004) [hereinafter Extraterritorial Federal Criminal Jurisdiction].

<sup>3</sup> Extraterritorial Federal Criminal Jurisdiction at 1.

<sup>4</sup> Telephone Interview with Jerry Behnke, AUSA Office, Riverside, California (Sep. 22, 2003).

<sup>5</sup> 18 U.S.C. § 7(3) (2003).

<sup>6</sup> 18 U.S.C. § 7(3) (2003).

<sup>7</sup> Major Gray W. Scott, *Closing the Extraterritorial Jurisdiction Gap Holding Civilians Accountable for Felony Crimes Committed Overseas While Supporting the U.S. Military*, 8 November 8, 2000, at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *See Reid v. Covert*, 354 U.S. 1 (1957), *United States v. Gatlin*, 216 F.3d 207 (2nd Cir. 2000), and *United States v. Averette*, 19 C.M.R. 363 (C.M.A.1970); Examples of serious criminal offense cases committed outside the United States and not prosecuted because the host nation declined to pursue the cases. Prosecution by U.S. authorities was not possible due to jurisdictional gaps in federal law.

<sup>13</sup> See 18 U.S.C. §§ 111-123 (2003).

<sup>14</sup> Major Gray W. Scott, *Closing the Extraterritorial Jurisdiction Gap Holding Civilians Accountable for Felony Crimes Committed Overseas While Supporting the U.S. Military*, 8 November 8, 2000, at 3.

<sup>15</sup> 18 U.S.C. § 7 (2003).

<sup>16</sup> U.S. CONST.

<sup>17</sup> Major Susan Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, at 118 (1995).

<sup>18</sup> Major Susan Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, at 114 (1995).

<sup>19</sup> Matthew Carlton Hammon, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 956, at 957 (1997).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 958.

<sup>23</sup> *The Military Extraterritorial Jurisdiction Act: Hearings on H.R. 3380 Before the Subcomm. on Crime Comm. on the Judiciary U. S. H.R.*, 106th Congress (2000) (statement of Mr. Reed, Office of the Gen. Counsel, Office of the Sec. of Def., Brigadier Gen. Joseph R. Barnes, Office of the JAG, U.S. Army, Brigadier Gen. James Smith, Commander 18th Fighter Wing, Kadena Air Force Base) [hereinafter *Hearings*].

<sup>24</sup> Major Lisa L. Turner and Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A. F. L. REV. 1, at 3 (2001).

<sup>25</sup> Major Lisa L. Turner and Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A. F. L. REV. 1, at 4 (2001).

<sup>26</sup> THE OPERATIONS SMARTBOOK GUIDE TO FM 3-0 FULL SPECTRUM OPERATIONS AND THE BATTLEFIELD OPERATING SYSTEMS, Norman M. Wade, The Lightning Press, 2002, at 1-45.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Major Lisa L. Turner and Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A. F. L. REV. 1, at 3 (2001).

<sup>30</sup> Neil King Jr., *Halliburton Tells Pentagon Workers Took Kickbacks to Award Projects in Iraq*, WALL STREET JOURNAL, Jan. 23, 2004, at 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 18 U.S.C. § 3261 (2004).

<sup>34</sup> Extraterritorial Federal Criminal Jurisdiction at 27.

<sup>35</sup> Major Michael E. Guillory, *Civilianizing the Force; Is the United States Crossing the Rubicon?* 51 A. F. L. REV. 111, at 114 (2001).

<sup>36</sup> *Id.* at 111.

<sup>37</sup> *Id.*

<sup>38</sup> Major Lisa L. Turner and Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A. F. L. REV. 1, at 3 (2001).

<sup>39</sup> Major Michael E. Guillory, *Civilianizing the Force; Is the United States Crossing the Rubicon?* 51 A. F. L. REV. 111, at 114 (2001).

<sup>40</sup> Major Michael E. Guillory, *Civilianizing the Force; Is the United States Crossing the Rubicon?* 51 A. F. L. REV. 111, at 111 (2001).

<sup>41</sup> Captain Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas –Still With Us*, 117 MIL. L. REV. 153, at 159 (1987).

<sup>42</sup> Captain Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas –Still With Us*, 117 MIL. L. REV. 153, at 175 (1987).

<sup>43</sup> *Id.*

<sup>44</sup> Lieutenant Colonel E. A. Gates and Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, at 147 (1984).

<sup>45</sup> *Id.* at 147.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 144.

<sup>50</sup> Major Lisa L. Turner and Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A. F. L. REV. 1, at 4 (2001).

<sup>51</sup> Major Glenn Schmidt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, at 80 (2001).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 82.

<sup>54</sup> *Id.*

<sup>55</sup> *Hearings* at 5.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Mark J. Yost and Douglas S. Anderson, *The Military Extraterritorial Act of 2000: Closing the Gap*, 95 A.J.I.L. 446, at 447 (2001).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Major Joseph R. Perlak, *Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, at 96 (2001).

<sup>68</sup> *Id.* at 97.

<sup>69</sup> Uniform Code of Military Justice art. 2[a](10)-(12) (2003).

<sup>70</sup> *Toth v. Quarles*, 350 U.S. 11, 15 (1955).

<sup>71</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>72</sup> See *Toth v. Quarles*, 350 U.S. at 23.

<sup>73</sup> *Id.*

<sup>74</sup> *Reid v. Covert*, 354 U.S. 1, 4 (1957).

<sup>75</sup> *Id.* at 65.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.* at 66.

<sup>79</sup> *Kinsella v. Krueger*, 351 U.S. 470, 472 (1956).

<sup>80</sup> Captain Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas –Still With Us*, 117 MIL. L. REV. 153, at 159 (1987).

<sup>81</sup> *Id.* at 154.

<sup>82</sup> U.S. CONST.

<sup>83</sup> *Kinsella v. Krueger*, 351 U.S. at 473.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *United States v. Averette*, 19 C.M.R. 363, 364 (C.M.A.1970).

<sup>88</sup> Captain Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas –Still With Us*, 117 MIL. L. REV. 153, at 159 (1987).

<sup>89</sup> *United States v. Averette*, 41 C.M.R. at 364.

<sup>90</sup> *Id.*

<sup>91</sup> *United States v. Corey*, 232 F.3d 1166, 1169 (9th Cir. 2000).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1171.

<sup>94</sup> *Id.* at 1176.

<sup>95</sup> *Id.* at 1183.

<sup>96</sup> Major Glenn Schmidt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad –A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, at 79 (2001).

<sup>97</sup> *United States v. Gatlin*, 216 F.3d 207, 210 (2d Cir. 2000).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 220.

<sup>102</sup> *Id.* at 223.

<sup>103</sup> *Id.* at 178.

## CHAPTER 2

### ANALYSIS OF MILITARY EXTRATERRITORIAL JURISDICTION ACT

The MEJA is codified in Title 18 U.S.C. § 3261 to § 3267.<sup>1</sup> It was signed into law by President Clinton on 22 November 2000 and authorizes the punishment of certain individuals who engage in any conduct outside the United States but within the “special maritime and territorial jurisdiction” of the United States.<sup>2</sup> It covers all offenses that are punishable by imprisonment for more than one-year.<sup>3</sup> This act supplements the “special maritime and territorial jurisdiction” statute of the United States by covering those individuals and offenses not originally encompassed within Title 18 U.S.C. § 7.<sup>4</sup>

Besides outlining the offenses covered, the act also provides guidelines for certain pretrial procedures. For instance, the act describes the steps from arrest to the potential removal of the accused to the United States. These steps are to be explained in more detail though the DoDI. However, the practicality of these detailed steps have yet to be tested. As a result, the Department of Justice (DoJ) and the Department of Defense (DoD) may still have constitutional and due process issues to face in light of such untested procedures and requirements to implement the act.

#### What Offenses are Covered?

The MEJA covers offenses that are punishable by more than one-year imprisonment if committed in the “special maritime and territorial jurisdiction of the United States.”<sup>5</sup> Some of the offenses that this act covers include; arson, certain aggravated assaults, theft over \$1000, homicide, kidnapping, damage to real or personal

property, selling obscene material, robbery, and certain sexual abuse or exploitation of minors offenses.<sup>6</sup>

### Who is Covered?

After determining if the offense is covered, the next step is to determine if the person or persons committing the crime overseas fall within the jurisdiction of the act. There are two categories of individuals subject to U.S. jurisdiction under the MEJA. First, the act covers those persons subject to the UCMJ at the time of the offense.<sup>7</sup> Second, the act covers those civilians “employed by” or “accompanying the armed forces.”<sup>8</sup>

The first category includes members of the armed forces who commit covered offenses while under the UCMJ but whose acts are not discovered until they are released or discharged from the service through retirement, separations, etc.<sup>9</sup> Active duty members may also be prosecuted under the MEJA if their co-defendant is a civilian.<sup>10</sup> Such a case may occur in order to ensure equal and fair discipline for both the military member and the civilian and to avoid multiple trials.

The second category of covered individuals includes those “employed by” or “accompanying the armed forces outside the United States.”<sup>11</sup> These terms are specifically defined by the act. For instance, those “employed by” the armed forces include DoD civilian employees and DoD non-appropriated fund instrumentalities.<sup>12</sup> They also include DoD contractors, subcontractors, and employees of either contractors or subcontractors.<sup>13</sup> The MEJA also covers subcontractors at any level.<sup>14</sup> The specific language of the MEJA indicates its broad reach:

(2) The term “accompanying the armed forces outside the United States means-

- (A) a dependent of
  - (i) a member of the armed forces;
  - (ii) a civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or
  - (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
- (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
- (C) not a national of or ordinarily resident in the host nation.<sup>15</sup>

Another requirement of the MEJA is that “employed” persons be “present or residing outside the United States in connection with such employment.”<sup>16</sup> As a result, the average tourist who might be employed by the DoD but who is not stationed overseas would not be subject to the act. However, a person may fall under the act if they reside outside the United States because of their employment and just happen to be a tourist.<sup>17</sup>

Those “accompanying the armed forces outside the United States” include dependents of members of the armed forces, dependents of civilian employees, and dependents of members of the armed forces, dependents of civilian employees, and dependents of DoD contractors and subcontractors at any level.<sup>18</sup> Any dependents accompanying the Armed Forces must be “residing” with the service member, civilian employee, or contractor.<sup>19</sup>

The only individuals who are excluded from the MEJA are the nationals of the host nation or those who are ordinarily residents of the nation.<sup>20</sup> These individuals are excluded from the act because the presumption is that the host nation will have sufficient interest in prosecuting these crimes, and therefore, justice will be served.<sup>21</sup> However, the act does not allude to the status of 3rd country nationals who may be hired by the United States to work in another foreign country. For example, the act does not explain whether

or not a resident of Pakistan hired by the United States and working in Iraq would be covered under its jurisdiction.

#### How It Works? From Pretrial Procedures to Removal to U.S.

The MEJA describes its purpose and who and what it includes simply and clearly. The difficult issues arise when conducting the actual pretrial procedures to enforce it. The MEJA specifies three steps that must be completed prior to the arrest of a person outside the United States.<sup>22</sup> First, the Secretary of Defense has to “designate a person serving in a law enforcement position in the DoD to arrest a violator of the MEJA.”<sup>23</sup> This designation will be made through DoD regulations governing the apprehension, detention, delivery, and removal of persons under the MEJA.<sup>24</sup> In addition, the arrest must be “in accordance with applicable international agreements.”<sup>25</sup> Lastly, there must be probable cause to believe that such a person violated the act.<sup>26</sup>

The MEJA further requires the prompt delivery of the arrested suspect to the United States or delivery to the “appropriate authorities of a foreign country,” depending upon the current international agreement with the country or the circumstances of the case.<sup>27</sup> However, the general rule is to promptly deliver the arrested person to the United States. If the host nation has an interest in the suspect, then the MEJA provides the flexibility of delivering the suspect to the appropriate authorities as long as it is authorized by a treaty or international agreement.<sup>28</sup>

In order to deliver a suspect to a host nation, the suspect’s conduct must be a crime under both the United States Code and the host country’s laws.<sup>29</sup> Furthermore, the delivery of the suspect to the host nation is only authorized for the trial of this conduct.<sup>30</sup> Therefore, the United States will not turn over a suspect if the host country does not

intend to prosecute this specific conduct. The MEJA also provides further protections for United States citizens by allowing the Secretary of Defense to determine which officials of the host nation may request and accept custody of the suspect.<sup>31</sup> Usually, a Status of Forces Agreement (SOFA) will determine the delivery of the suspect to the host nation.<sup>32</sup>

The third step in this process is the removal of the suspect to the United States. This is somewhat complicated in that parts of the MEJA, specifically 18 U.S.C. § 3262(b) and § 3264(a) seem to contradict one another.<sup>33</sup> For example, 18 U.S.C. § 3262(b) states that a person arrested under the MEJA “shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings...”<sup>34</sup> However, 18 U.S.C. § 3264 states that a suspect “shall not be removed to the United States.” On the other hand, other language within the MEJA resolves this apparent contradiction. In § 3264(b) there are five conditions that describe when the removal of a suspect to the United States does not apply.<sup>35</sup> These conditions are:

- (1) A federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to 18 U.S.C. § 3142(f);
- (2) A federal magistrate judge orders the detention of the person before trial pursuant to 18 U.S.C. § 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;
- (3) The person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;
- (4) A federal magistrate judge otherwise orders the person to be removed to the United States; or
- (5) The Secretary of Defense determines that military necessity requires that the limitations in subsection (a) above be waived, in which case the person shall be removed to the nearest United States military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in 18 U.S.C. § 3265(a).<sup>36</sup>

The mandate from § 3262(b) that states “for removal to the United States for judicial proceedings...” applies when these prohibitions above are no longer applicable.<sup>37</sup>

Once the suspect is arrested, detained, or delivered to the appropriate authorities, the MEJA requires that the magistrate conduct a suspect’s initial appearance under the Federal Rules of Criminal Procedure (FRCP).<sup>38</sup> The term, “initial appearance” is misleading since the MEJA allows telephonic procedures to suffice as an initial appearance. The MEJA is not clear on who should be the magistrate to conduct the hearing. Enclosure 6 at the end of this chapter clarifies the appointment, power, and supervision duties of the magistrate.

Once the magistrate is selected, he or she determines if there is probable cause that the suspect committed the offense.<sup>39</sup> If probable cause is found and there is no pretrial detention required, the magistrate must then determine the suspect’s conditions for release before trial.<sup>40</sup> Both the MEJA and Rule 5(a) of the Federal Rules of Criminal Procedure govern these procedures.<sup>41</sup> Under Rule 5(a) of the FRCP, a person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate, unless a statute provides otherwise.<sup>42</sup>

First, the magistrate must inform the suspect of the complaint and any affidavit filed with it.<sup>43</sup> The magistrate must also inform the suspect about the right to retain counsel or have counsel assigned and that the suspect need not make any statement.<sup>44</sup> In addition, the magistrate must also inform the suspect that any statement made could be used against him.<sup>45</sup> Finally, the suspect is entitled to a preliminary examination and the general conditions for release prior to trial are described to the suspect.<sup>46</sup>

Lastly, the MEJA describes the right of a suspect to have counsel appointed for purposes of the initial proceeding since these proceedings may occur prior to a suspect's removal or return to the United States.<sup>47</sup> As a result, civilian suspects have the ability to retain military defense counsel for crimes committed outside the United States.<sup>48</sup>

#### Recommendations for Revisions to Existing MEJA

As a recommendation, § 3264(b)(5) should be changed to allow a person to be removed to the nearest United States military installation inside or outside the United States. The act as currently written does not allow for a person to be removed to a military installation within the United States. In the interest of convenience, this section should be revised as appropriate. The enclosure at the end of this chapter shows a sample of § 3264(b)(5).

#### Gaps Within Pending Department of Defense Instruction

##### (i) Definition of Terms:

##### Felony Offense

After analyzing the procedures of pretrial arrest to removal to the United States, there are several procedural, constitutional, and due process concerns. In this section, each of these issues will be identified in conjunction with the proposed DoDI and the case of *United States v. Arnt* to determine if these concerns have been resolved.

Since the MEJA has only been in existence for over three years, the questions of enforcement and practicality have not been addressed. For example, the purpose of the DoDI is to implement policies and procedures and to assign responsibilities to exercise extraterritorial criminal jurisdiction over certain current and former members of the United States armed forces, and over civilians employed by or accompanying the United

States armed forces outside the United States.<sup>49</sup> However, the DoDI fails to identify exactly what constitutes a felony offense.<sup>50</sup> This instruction should define exactly what is meant by a felony type crime and give pertinent examples. This is an essential jurisdictional part of the statute and a criminal offense must be clearly identified in order to help prosecutors and others understand the scope and parameters of the instruction. At the end of this chapter, Enclosure 2 gives a specific definition of felony offense.

### Serious Misconduct

In addition, the DoDI states in Enclosure 3: Principles and Guidelines, that the procedures of the instruction should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate.<sup>51</sup> Moreover, the DoDI gives some examples of this conduct to include the following:

- E3.6.1. Substantial or serious frauds against the Government of significant attempted or actual theft, damage, or destruction of Government property;
- E3.6.2. Death or serious injury to, attempted injury or threatened injury to, or sexual assault of a national of the U.S., or any other person employed by or accompanying the armed forces outside the U.S., as defined in enclosure 2; or
- E3.6.3. Conduct that affected adversely or threatened to affect adversely the readiness, morale, discipline, or health of the armed forces or its members.<sup>52</sup>

However, this serious misconduct is not defined with concrete examples. Accuracy and specificity are essential in carrying out the intent of this statute. As a result, Title 22 of the United States Code should be used to define the misconduct within E3.6.1 and E3.6.2 above. Specifically, Title 22 lists the definition for a serious criminal offense as a felony under Federal, State, or local law punishable by a term of imprisonment of more than one year.<sup>53</sup>

In addition, Article 134 from the UCMJ is also provided as a guideline to indicate those crimes that constitute serious misconduct. Specifically, Article 134, misprison of a serious offense, is any offense punishable under the authority of the code by death or by confinement for a term exceeding one year.<sup>54</sup> These offenses are reported to either civil or military authorities depending upon the circumstances. Misprison of a serious offense should help define E3.6.3 as conduct that adversely affects or threatens to affect the readiness, morale, discipline, or health of the armed forces or its members and is punishable by confinement for a term exceeding one year. This definition seems particularly on point since it is conduct that is specifically linked to the health and morale of armed forces service members. Besides this, all active duty service members fall under the UCMJ as members of the military.<sup>55</sup> Thus, these definitions are included in Enclosure 3: Principles and Guidelines of the DoDI to give clarity and specificity to the instruction.<sup>56</sup>

#### Dependent and Family Member

Another potential gap in the DoDI are the person or persons subject to the instruction. For instance, the instruction states that it “applies to certain members of the armed forces, former members of the armed forces, and persons employed by or accompanying the armed forces outside the United States and their family members... who are alleged to have committed an offense under the Act while outside the United States.”<sup>57</sup> Unfortunately, the instruction does not indicate within the definition section or the body of the instruction what constitutes a family member.<sup>58</sup> For instance, the instruction defines family member by referring to the term, “dependent.”<sup>59</sup> However, the term “dependent” is neither defined within the instruction nor the MEJA. Although the

MEJA attempts to define “dependent” through a correlation with the term “accompanying the armed forces outside the United States”, the reader is left with a circular definition of all three terms.<sup>60</sup>

More importantly, the instruction does not provide information on what legal status is sufficient to be a family member. For example, there is a question of whether an accused, if legally separated or just visiting a service member, would be eligible for “family member” status. An assumption can be made that since the UCMJ does not recognize legal separation as a marital status nor will this instruction but this is not clearly articulated in the DoDI.<sup>61</sup> A review of Army Directive 608-99, gives a definition of divorce that aids in defining what legal separation is not.<sup>62</sup> Specifically, the term divorce is defined as the final decree of divorce of dissolution of marriage that completely severs the marital relationship, as opposed to limited divorce, legal separation, or so-called divorce from table and bed or bed and board.<sup>63</sup> In addition, a review of the DoD regulations does not offer any further clarity. Thus, the term, “legal separation”, as included in Enclosure 2, may exclude an individual from “family member” status. This is significant for the case of first impression as well as in future cases that involve legally separated couples in the military.

Jurisdiction under the act also requires that the dependent “reside” with a “family member.” According to the instruction, the term, “family member”, is defined as a dependent of one of the following:

- (1) Active duty members of the armed forces;
- (2) Members of the reserve component while the member was on active duty or inactive duty for training, but in the case of members of the Army

National Guard or the Air National Guard of the United States, only when in Federal service;

(3) Former members of the armed forces who are employed by or are accompanying the armed forces outside the United States.

(4) Civilian employees of the Department of Defense (including non-appropriated fund instrumentalities of the Department of Defense).

(5) Department of Defense contractors (including a subcontractor at any tier).

(6) Employees of a Department of Defense contractor (including a subcontractor at any tier).<sup>64</sup>

In addition, the term “reside” is not defined within the instruction. The criteria for residing must be clearly provided within the instruction.<sup>65</sup> Enclosure 2 at the end of this chapter provides a sample definition.

#### Scope of Department of Defense Instruction:

##### Armed Forces Categories

In addition, the applicability and scope of the instruction needs clarity. For example, the instruction does not address midshipmen, cadets, and merchant marine students from the reserve officer training curriculums, nor does it address students from all service academies.<sup>66</sup> The instruction has omitted these categories of individuals who are technically members of the armed forces. The question of whether midshipmen, cadets, merchant marines and students of the service academies fall within the category of “armed forces” needs to be addressed and defined appropriately. For example, suppose a midshipman from the United States Naval Academy is on summer cruise in Naples, Italy. While on cruise, the midshipman murders a dependent civilian on a military installation. Most likely, the midshipman’s administrative status was properly

changed from inactive to active service to fulfill his or her summer duties. However, the instruction does not mention midshipmen, cadets, or merchant marines within the definition of inactive duty training.<sup>67</sup> Thus, to avoid any jurisdictional problems, the status of these groups needs to be defined appropriately.

Other ambiguous terms that are included within the MEJA should also be defined within the DoDI. For example, MEJA § 3262 is titled “Arrest and Commitment”, however, commitment is ambiguous and not defined within the instruction or the act.<sup>68</sup> Terms such as “within the special maritime and territorial jurisdiction of the United States”<sup>69</sup> and civilian law enforcement authorities are also used within the statute but not defined throughout the instruction. To correct these issues, the instruction should include an extensive definition section. For instance, the following terms should be included; arrest and commitment, cadet, command sponsorship family member, custody, felony, host nation, inactive duty training, initial proceeding, last known residence, legal domicile, legal separation, limited representation, probable cause, reside, serious misconduct, and “within the special maritime and territorial jurisdiction of the United States.”<sup>70</sup> These terms are currently defined in Enclosure 2, the definition section of the instruction.<sup>71</sup>

#### DoD and DoJ Responsibilities

Moreover, the responsibilities of each agency or component must also be clearly defined. For example, under the Domestic Security Section (DSS), Criminal Division of the MEJA, the DoJ is to provide assistance to the DoD.<sup>72</sup> The DSS is responsible for notifying all federal agencies and law enforcement organizations.<sup>73</sup> It is also responsible for retaining a magistrate, establishing proper venue, and carrying out all other pretrial

matters.<sup>74</sup> The DSS is also to serve as the single point of contact for DoD personnel.<sup>75</sup> However, when an actual case is being processed there will likely be little time to organize these events. For example, the initial proceeding of *United States v. Arnt* was delayed unnecessarily because of a communication breakdown between DoD and DoJ personnel.<sup>76</sup> Therefore, it is necessary that the instruction specifically state what department or division of the DoJ will handle these preliminary decisions regarding proper venue and the assignment of appropriate DoJ responsibilities.

Gaps with Venue, Federal Arrest Warrants, Arresting Procedures,  
Detention, and Delivery Procedures, Limited Military Defense Counsel,  
and Physical Presence of Counsel

Venue Preference

Besides terminology, responsibilities, and interpretation issues, there are also gaps with venue, federal arrest warrants, arresting procedures, detention, and delivery of persons to host nation and United States authorities. For instance, the specification of an individual's "last known address" determines which federal district will be responsible for possible future criminal proceedings. However, the question of whether an individual's venue preference or the DoJ preference takes priority has not been answered. This may be an issue that violates an individual's Sixth Amendment right to "enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."<sup>77</sup> An accused under the MEJA is not only detained and transported to the United States without the ability to pursue his case in the district where the crime was committed, but he does not get a choice of venue for his defense. Either way, there is no flexibility within the instruction or the statute allowing the suspect

any choice. The instruction should give the accused a choice of either his home of record or his or her last duty station.

According to *Verosol v. Liken Home Furnishing*, the district court ruled that it must consider all relevant factors to determine whether or not the litigation would proceed more conveniently and that the interests of justice would better be served [in a certain] forum.<sup>78</sup> Here, the burden would be on the defendant to establish why there should be a change of forum.<sup>79</sup> It is not good enough to state that another venue is preferred.<sup>80</sup> In addition, the balance of convenience must strongly favor the moving party before a transfer could be ordered.<sup>81</sup> Although in *Verosol*, the defendant failed to meet its burden to warrant a transfer of venue, this crime did not occur overseas and it did not involve felony murder.<sup>82</sup>

When a crime occurs overseas and it is prosecuted in the United States, the defendant as the moving party would have several reasons to request a venue specific to his or her convenience. For example, the defendant could argue that they are already at a disadvantage because the case is being prosecuted in a different forum due to the crime being committed overseas. Based on this argument, the defendant could also argue that they are either less or more able to litigate an action in a particular forum. Moreover, the defendant could also argue that the defendant's principal lawyer is located in a certain forum and that all resources are also located there. Lastly, the defendant could argue that the docket in a certain forum is more or less congested causing unnecessary delay and hampering their right to a speedy trial. Since the defendant cannot get the case prosecuted wherein the crime was committed, the next best alternative would be to allow the defendant the first choice of venue to balance the interests of justice.

### Federal Arrest Warrants

Furthermore under the act, federal arrest warrants and indictments are not required as predicates to arrests.<sup>83</sup> In fact, the instruction does not stress the requirement of obtaining a federal arrest warrant. It states, “Because the locations of the offense and offender are outside the U.S., it is not normally expected that a previously-issued federal arrest warrant would be available when an arrest may be required.”<sup>84</sup> Since the instruction understates and underemphasizes the significance of obtaining an arrest warrant, this leaves the door open to possible appeals. This absence of a federal arrest warrant poses a potential constitutional issue. Even though the Fourth Amendment<sup>85</sup> does not apply overseas, courts will have a difficult time allowing the random arrest of civilians without extreme immediacy or danger. The instruction fails to define this area. Although the DoDI states that authorizations issued by military magistrates may not be used as a substitute for federal arrest warrant requirements, it does not seem unreasonable to allow a military judge to act in the temporary capacity of a magistrate to issue a federal arrest warrant.<sup>86</sup> As long as the military magistrate is acting in a neutral and detached capacity, there should be no issues.

For example, in the case of *United States v. Verdugo-Urquidez*, the Supreme Court ruled that protection against unreasonable searches and seizures did not extend to aliens outside the United States.<sup>87</sup> Here, the defendant a Mexican citizen and resident was arrested by Mexican police and transported to the United States.<sup>88</sup> He was believed to be the leader of a violent drug organization that smuggled narcotics into the United States.<sup>89</sup> Based on a complaint charging him with various narcotic-related offenses, the Drug Enforcement Administration (DEA) agents, working with Mexican officials,

arrested the defendant.<sup>90</sup> Subsequently, they searched his Mexican residence and seized evidence.<sup>91</sup> In the District Court, the defendant's motion to suppress this evidence was affirmed.<sup>92</sup> Next, a panel from the Court of Appeals for the Ninth Circuit heard the case and affirmed the decision but they were deeply divided on the issue of whether the Fourth Amendment applied overseas.<sup>93</sup> Specifically, the Ninth Circuit cited the *Reid v. Covert* case that held that American citizens tried by United States military authorities in a foreign country were entitled to the protections of the Fifth and Sixth Amendments.<sup>94</sup> Thus, the Supreme Court in *Reid* concluded that the Constitution imposes substantive constraints on the government when it operates overseas.<sup>95</sup> In fact, the plurality opinion in *Reid* stated:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.<sup>96</sup>

Based on this theory, this case law can be interpreted to imply that the Fourth Amendment does apply overseas. Since this case decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments,<sup>97</sup> it can also be logically inferred that citizens would be guaranteed protection under the Fourth Amendment.<sup>98</sup>

Here, the defendant, Verdugo-Urquidez, cannot receive protection under the Constitution because he is not a U.S. citizen.<sup>99</sup> However, a defendant that is a U.S. citizen may be able to argue that these constitutional protections apply overseas. Realistically in

July 2004, this theory will be tested with the first case of impression to be prosecuted under the MEJA.

### Arresting Procedures

Besides the lack of a federal arrest warrant, the DoDI also authorizes persons in DoD law enforcement positions to arrest those outside the United States upon probable cause and in accordance with recognized practices with host nation authorities and applicable international agreements.<sup>100</sup> These law enforcement officials may also have to deliver suspects to the appropriate authorities of the foreign country where the person is alleged to have violated the act. However, the instruction does not specifically state that U.S. law enforcement officials need to refer to the appropriate SOFA to properly deliver suspects to foreign authorities. Thus, the proposed enclosures at the end of this chapter state these specific requirements to ensure that law enforcement officers act in the interests of national security. In addition, these measures will ensure that agents representing the United States avoid any potential diplomatic and political mistakes that could bring discredit to the nation. Reference to appropriate international agreements or SOFAs will provide law enforcement officials with helpful guidelines. It will also make these officials aware of recognized practices within the host nation as well as facilitate smooth delivery of the American suspect.

### Detention Procedures

Besides the lack of a requirement for federal arrest warrants, the procedures for the detention of individuals under the act also appears problematic. For example, a person arrested may be temporarily detained in a military detention facility for a “reasonable period”, in accordance with regulations of the Military Departments.<sup>101</sup> But

a “reasonable period” is not defined in the instruction, nor is there any case law that is identified to clarify the term. As a result, the instruction should refer to RCM 305 as a guideline to define reasonable period. In addition, the instruction states that temporary detention should be ordered only when a serious risk is believed to exist that the person shall flee and not appear.<sup>102</sup> This is not extremely problematic but in order to avoid the unnecessary detention of civilians, magistrates and commanders must make sure that a serious risk truly exists.

The Manual for Courts-Martial (MCM) may also provide some useful guidance in this case. Specifically, Rule for Courts-Martial (RCM) 305 provides useful guidelines for those in temporary detention.<sup>103</sup> Since this rule deals with pretrial confinement, a similar rule for civilians should be created to avoid potential constitutional problems. For instance, the civilian pretrial confinement rule should discuss, as RCM 305 does, who may be confined, who may order confinement, and when a person may be confined.<sup>104</sup> The rule should also provide guidelines on the advice that should be given to the accused as well as discuss who may direct the release of the accused from confinement.<sup>105</sup> Even more importantly, Rule 305 specifies seven factors that should be considered to avoid confining a person as a matter of convenience or expedience.<sup>106</sup> These factors are extremely important in protecting an individual’s rights and should be incorporated within the DoDI to give commanding officer’s guidance. Rule 305 further states that less serious forms of restraint must always be considered before pretrial confinement.<sup>107</sup> Neither the DoDI nor the MEJA specify less forms of restraint as options. In addition, Rule 305 can be used as a model for the procedures for review of pretrial confinement by

another magistrate. The proposed enclosure at the end of this chapter shows a version of a potential civilian pretrial confinement rule under the DoDI.

#### Federal Magistrate's Adoption of Military Magistrate Policies for Pretrial Confinement

In addition, the DoDI should adopt the military magistrate policies from Chapter Nine of Army Regulation 27-10 (Military Justice).<sup>108</sup> Specifically, the magistrate should review pretrial confinement in accordance with RCM 305. In this way, the magistrate can use both the due process requirements and the RCM 305 to provide the maximum means of justice under the law. For instance, the appointment, powers, and supervision of federal magistrates can follow the similar guidelines outlined in Chapter Nine of the Military Magistrate Program. In addition, the pretrial confinement procedures, search and seizure, and apprehension authorizations for magistrates can also follow these guidelines. For example, the enclosure at the end of this chapter outlines the magistrate policies in accordance with DoDI, MEJA, and 28 U.S.C. § 631, the appointment and tenure of United States Magistrates. In addition, Title 28 of the United States Code should be revised to reflect the need for the designation of magistrates in operational theaters.<sup>109</sup> Enclosure 7 implements these changes and shows a revised version of 28 U.S.C. § 636.

#### Limited Military Defense Counsel

The use of limited military defense counsel for civilian personnel under the act also poses some questions. In fact, the DoDI requires that an individual waive his or her right to receive full representation.<sup>110</sup> Overall, this agreement signed by the accused, forces a waiver of his or her right to adequate counsel.<sup>111</sup> Moreover, an accused is caught in a quandary because he or she needs counsel immediately and yet, at this point in the

process they have “limited” representation. Unfortunately, the suspect has no alternative but to sign the waiver to at least guarantee some type of counsel rather than none at all.

Specifically, the instruction states that the accused acknowledges and understands that the appointment of military counsel for the limited purpose of legal representation in proceedings is dependent upon the accused being able to retain civilian defense counsel representation and that qualified military defense counsel has been made available.<sup>112</sup> In addition according to 18 U.S.C. § 3265, military defense counsel is only for the limited purpose of representing the accused at the initial proceeding or initial detention hearing.<sup>113</sup> Thus, in the crucial stages of an accused’s case he or she is “limited” by their military defense counsel. By signing this “limited” military defense counsel form, an accused is agreeing to the waiver of full representation by qualified counsel. In fact, the military defense counsel is in effect abandoning his client during the initial stages of a case.

For instance, in the case of *United States v. Robertson*, the United States Air Force Court of Military Review concluded that the defendant had received ineffective assistance of counsel.<sup>114</sup> In this case, the accused challenged the verdict of a general court-martial that convicted him of using cocaine.<sup>115</sup> On appeal, the accused did not get the timely assistance to prepare post-trial submissions.<sup>116</sup> As a result, the accused appealed the effectiveness of his post-trial representation.<sup>117</sup> In fact, this Court even states that it appears as if the military defense counsel had abandoned his client.<sup>118</sup> According to *Robertson*, in military practice there is a very strong theme that defense counsel’s representation must continue through the post-trial activities until counsel is succeeded.<sup>119</sup> Moreover, the case of *United States v. Palenius* also advocates that the

defense attorney must honor and maintain the attorney-client relationship with his client subsequent to the finding of guilty while awaiting designation and the performance of substitute trial counsel.<sup>120</sup>

Although the case of first impression discussed in the next section involves pretrial matters, the same can be said of military counsel abandoning clients at the pretrial stages of a case. This point will be elaborated further in the case of *United States v. Arnt*.

#### Physical Presence of Counsel

Furthermore, the instruction does not address whether or not representation has to be face-to-face. The instruction even indicates that the use of phone or video conferencing is appropriate. However, there is probably an argument of whether the accused is entitled to face-to-face contact in order to receive adequate counsel. Assuming that adequate counsel requires personal face-to-face contact, this limited representation poses some constitutional issues and possibly violates an individual's Sixth Amendment rights. In fact, this Amendment states that in all criminal prosecutions, "the accused shall enjoy... the Assistance of Counsel for his defense."<sup>121</sup> In *Strickland v. Washington*, the Supreme Court used a two-prong test to determine if a counsel's assistance to the accused is ineffective and therefore in violation of the Sixth Amendment:<sup>122</sup>

- 1) The defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the 6<sup>th</sup> Amendment.
- 2) The defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>123</sup>

Here, if a suspect can show that military counsel was deficient they may be able to prove that their Sixth Amendment rights were violated. For example, a military counsel's limited representation does not allow an individual to receive full representation. For instance, because of limited counsel, an individual is not receiving one hundred percent guidance for their case. An argument can be made that this is deficient performance that prejudices the defense.

Furthermore, in the case of *Illinois v. Stroud*, the defendant appealed his conviction because it was conducted over closed circuit television.<sup>124</sup> Here, the defendant argued that he had a constitutional right to be physically present at his guilty plea hearing. In fact, at no time did the defendant waive his right to be physically present in the courtroom.<sup>125</sup> Thus, in January 2004 of this year, the Supreme Court of Illinois ruled that the defendant's due process right to be present for his trial proceedings were violated when the proceedings were conducted via closed circuit television.<sup>126</sup>

Lastly, the case of *United States v. Burke* explains some crucial legal points when discussing the Confrontation Clause of the Sixth Amendment.<sup>127</sup> Specifically, in October 2003, the United States Court of Appeals for the Sixth Circuit stated that the Confrontation Clause does not guarantee criminal defendants an absolute right to a face-to-face meeting with witnesses against them at trial.<sup>128</sup> The Clause's central purpose is to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact.<sup>129</sup> This adversary process was conducted through the combined effects of the physical presence of all parties, cross-examination, testimony under oath, and the observation of demeanor by a judge or magistrate.<sup>130</sup> Although face-to-face confrontation forms the core of the Clause's values,

it is not a necessary element of the confrontation right.<sup>131</sup> As a result, the Clause is interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process.<sup>132</sup> Nevertheless, the right to confront accusatory witnesses may be satisfied without a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured.<sup>133</sup>

Here, a defendant that is on trial for felony murder may argue that it is against public policy to be unable to physically confront the trier of fact. It is a crucial public policy that suspects be able to face prosecutors, triers of fact, witnesses, and defense counsel in person. Unfortunately, video conferencing and close circuit television eliminate the observable emotions and behaviors that may affect proceedings.

#### Request for Public Defender By Showing of Financial Hardship

Moreover, before an accused is entitled to a public defender, the accused must show financial hardship. Here, the DoDI does not state what documentation or support the accused is suppose to provide in order to show financial hardship. The DoJ should conduct a preliminary investigation or credit check to determine if the accused shows financial hardship. For instance, the DoJ should be required to fill out a request in order for the accused to obtain a government public defender. The proposed enclosures at the end of this chapter provide a sample request form for a public defender.

#### Due Process Requirements for Initial Hearing

Before an individual is transferred to the United States, a suspect is entitled to an initial hearing. According to the DoDI, a person arrested for or charged with a violation of the act may be entitled to an initial appearance before a judge and/or a detention

hearing.<sup>134</sup> These proceedings are intended to follow the requirements of the Federal Rules of Criminal Procedure (FRCP).<sup>135</sup> However, the instruction does not outline the due process requirements to which a suspect is entitled. In fact, the DoDI mentions the case of *Gerstein v. Pugh* but does not provide any analysis to explain the exact due process requirements that a suspect is entitled to.<sup>136</sup>

In *Gerstein*, the United States Supreme Court agreed that the Fourth Amendment required a timely judicial determination of probable cause as a prerequisite to detention.<sup>137</sup> On the other hand, the Supreme Court did not agree that the Fourth Amendment required the determination of probable cause to be in the form of an adversary hearing.<sup>138</sup> Adversary safeguards such as counsel, confrontation, cross-examination, and compulsory process for witnesses are not a requirement to make a probable cause determination.<sup>139</sup> *Gerstein* states that these adversary safeguards are not essential for the probable cause determination because the issue can be determined reliably without an adversary hearing.<sup>140</sup>

In addition, the *Gerstein* did not state that law enforcement must provide a probable cause hearing immediately upon taking a suspect into custody.<sup>141</sup> In fact, the Court acknowledged the burden that pretrial proceedings places on the criminal justice system and balanced these interests with the interests of all parties involved including the detainee.<sup>142</sup> Thus, *Gerstein* does not mandate states to follow a federal procedural framework and allows individual states the flexibility to integrate their own probable cause determinations.<sup>143</sup>

Moreover, the DoDI also refers to the case of *County of Riverside v. McLaughlin* and specifies that the initial appearance shall be conducted within forty-eight hours of the

arrest.<sup>144</sup> The instruction also states that the initial hearing be conducted without “unnecessary delay.”<sup>145</sup>

After reviewing the *Gerstein* and *McLaughlin* cases, it can be argued that the instruction is advocating the flexibility of conducting probable cause hearings within a reasonable time. Even though *Gerstein* is based within the United States, it can be interpreted that the instruction is giving enormous flexibility to the due process requirements overseas. The instruction should refer to the pretrial confinement procedures in Enclosure 5 to clarify the reasonable grounds for confinement. Specifically, the magistrate shall not later than forty-eight hours after the commander’s ordering of an accused into pretrial confinement, decide whether pretrial confinement should continue through a probable cause hearing. For instance, the magistrate should base his or her decision upon probable cause and reasonable grounds. Some of the reasonable grounds to consider are;

- a. An offense triable by a U.S. district court has been committed;
- b. The accused committed it; and
- c. Confinement is necessary because it is foreseeable that;
- d. The accused will flee the country and not appear at trial, pretrial hearing, or investigation, or
- e. The accused will engage in serious criminal misconduct; and
- f. Less serious forms of restraint are inadequate.<sup>146</sup>

Thus, the instruction should include a statement referring to these reasonable grounds but allow the flexibility for unforeseen circumstances as the case *Gerstein v. Pugh* indicates.

The proposed enclosures at the end of this chapter indicate step by step the appropriate due process requirements for a suspect before pretrial confinement. Specifically, this rule discusses who may be confined, who may order the confinement, when a person may be confined, who may direct release from confinement, the actions by

the magistrate, the requirements of confinement, the consideration of less serious forms of restraint, the factors under which civilians should be confined, a review of pretrial confinement, and those exceptions for operational necessity.<sup>147</sup> In fact, this rule unlike the MEJA or the DoDI considers less serious forms of restraint such as house arrest. It also allows a military judge to order confinement.

Thus, these are the most significant gaps and issues within the pending DoDI. Until the first case under the MEJA is resolved, there will continue to be many unanswered questions. New issues will likely come to light after a final decision is made. The following analysis of the case of first impression will give us a true litmus test on how successful the DoD and the MEJA will be in preventing a jurisdictional gap.

*United States v. Arnt*

In *United States v. Arnt*, the first case to succumb to the MEJA, a civilian spouse of an Air Force Staff Sergeant has been charged with the murder of her husband at Incirlik Air Force Base, Turkey.<sup>148</sup> According to the affidavit, on 26 May 2003, at approximately 1145 hours, Jason Ziokowski, an Air Force service member who was on duty working the law enforcement desk received a call from the suspect who stated, “I stabbed my husband.”<sup>149</sup> Soon after, Arnt was arrested and detained at Incirlik Air Force Base in connection with the death of her husband and subsequently turned over to United States Marshals on 29 May 2003.<sup>150</sup>

Since the state of California is the home of record of the accused, the United States Attorney’s Office for the Central District of California assumed jurisdiction of the case.<sup>151</sup> On 30 May 2003, Arnt was formally indicted for second-degree murder by the grand jury of the United States District Court for the Central District of California and was ordered held without bail.<sup>152</sup>

Before California assumed jurisdiction, the Staff Judge Advocate (SJA) of the 39<sup>th</sup> Wing, Incirlik Air Force Base contacted the Turkish military attorney, who in turn contacted the local Turkish public prosecutor to determine if the Turkish government wanted to pursue the case.<sup>153</sup> The local Turkish public prosecutor advised that he was not interested in pursuing jurisdiction of the case because it occurred on a United States military base and it involved only Americans.<sup>154</sup> Although Turkey declined to assume jurisdiction over the case, a Turkish attorney was hired to represent Arnt in the case that Turkish officials wanted to take any further action against her.<sup>155</sup> This attorney did not question or speak to Arnt but was available if needed.<sup>156</sup>

Since Arnt was detained from approximately midnight on 26 May 2003, the initial proceedings needed to be completed by midnight on 28 May 2003. The initial proceedings were scheduled to take place on 28 May 2003 telephonically before a magistrate. However, the actual hearing did not take place until two hours after the scheduled time because the affidavit was not complete.<sup>157</sup> With this information, the AUSA charged Arnt with the murder of her husband in violation of 18 U.S.C. § 1111 and § 3261(a).<sup>158</sup> At the hearing, the magistrate determined that there was probable cause to detain Arnt. He ordered that she remain in confinement and returned to the United States in the custody of United States Marshals by 6 June 2003. On 9 June 2003, Arnt was scheduled to attend a post indictment arraignment proceeding.<sup>159</sup>

After Arnt was transferred to the United States, she attended her preliminary hearing on 9 June 2003. At the hearing, the magistrate ordered that she be placed on house arrest with \$100,000 bond. Currently, Arnt has hired a defense attorney and is awaiting trial. Her trial is scheduled to occur 11 July 2004.<sup>160</sup>

#### Potential Gaps With Case of First Impression

A review of each step of Arnt's case will determine whether or not vulnerabilities exist in the overall jurisdiction and implementation of the MEJA. For example, potential issues such as unnecessary delay, the requirement of a federal arrest warrant, temporary detention of a civilian in military confinement, limited military defense counsel, adequate representation, the cost to the government of receiving limited military defense counsel, the deposition and subpoena of foreign witnesses, and the application of the DoDI will all be analyzed in the next few paragraphs. Through this analysis, these vulnerabilities and

obstacles will be exposed, ultimately to help promote a revised DoDI and to prevent future jurisdictional gaps.

#### Unnecessary Delay

Assuming Arnt was charged with a violation of the MEJA and that there was a proper probable cause determination, the initial proceedings of her case may lead to some constitutional questions. For instance, even though Arnt's initial appearance may have been held within the required forty-eight hours of being detained, she may have experienced "unnecessary delay" due to the administrative inefficiency and lack of coordination between Air Force officials and attorneys in Riverside, California. In fact, the delay was caused by the lack of an affidavit charging Arnt with the murder of her husband. As a result, Arnt was detained from midnight on 26 May until her hearing on 28 May at 2200 hours, barely meeting the forty-eight hour initial appearance requirement.

According to the DoDI, the initial appearance must be conducted within forty-eight hours of being arrested. It also requires that the proceedings be conducted without "unnecessary delay." Unfortunately, the instruction does not define "unnecessary delay." It does, however, refer to the decision in *County of Riverside v. McLaughlin* as an appropriate authority. As mentioned earlier, the DoDI should use the procedures for civilian pretrial confinement in Enclosure 5 to establish reasonable grounds for the detainment of civilians. These reasonable grounds will clarify and ensure that initial proceedings are conducted without "unnecessary delay."

#### No Federal Arrest Warrant Issued

Besides the unnecessary delay issue, there is also a question of Arnt's arrest. Specifically, there was no federal arrest warrant issued before her arrest. Although the

DoDI instruction states that federal arrest warrants and indictments are not required as predicates to arrests under the act, it does indicate that it is preferable to file a criminal complaint with supporting affidavits or obtain a grand jury indictment prior to arresting the person for a violation of the act.<sup>161</sup>

For instance in the case of *United States v. Verdugo-Urquidez*, a Mexican citizen was arrested and brought to the United States for drug smuggling activity.<sup>162</sup> Following his arrest, Drug Enforcement Administration (DEA) agents searched his Mexican residence without a search warrant.<sup>163</sup> As a result, the suspect Verdugo-Urquidez, filed a motion to suppress this evidence.<sup>164</sup> However, the Supreme Court of the United States ruled that since the accused was a resident of Mexico with no voluntary attachment to the United States, and because the residence searched was in Mexico, the protections against unreasonable search and seizure from the Fourth Amendment had no application.<sup>165</sup> As a result, the Supreme Court refused to permit the application of the Fourth Amendment overseas.<sup>166</sup>

On the other hand, the question of whether the Fourth Amendment applies overseas for a U.S. citizen has not been contemplated. Here, Arnt, a U.S. citizen, is voluntarily accompanying an armed forces service member overseas and living on federal property. Although she has voluntarily traveled to Turkey, she is still an American citizen protected by the Constitution of the United States. With this in mind, it can be argued that her Fourth Amendment rights have been violated. Based on the earlier discussion of *Reid v. Covert*, which held that American citizens are entitled to the protections of the Fifth and Sixth Amendments overseas,<sup>167</sup> it seems logical that this would extend to the Fourth Amendment. Although the Fourth Amendment has never

been applied overseas, the case of *United States v. Arnt* may be the first case to do so. This issue will be a major point of contention and a critical part of the defense's argument.

#### Temporary Detention

Another issue related to the arrest is Arnt's temporary detention. In this case, Arnt was visiting her husband with her two-month-old baby. According to the DoDI, temporary detention should be ordered only when a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing, or trial proceedings, or that the person may engage in serious criminal misconduct.<sup>168</sup> Here, it can be argued that Arnt was not a flight risk with a two month-old baby in a foreign country. Furthermore, it can be argued that a civilian should not be confined as a mere matter of convenience or expedience.<sup>169</sup> From the facts, there is no indication that any less serious forms of restraint were even considered before pretrial confinement.<sup>170</sup> Even though the instruction indicates that temporary detention is determined on a case-by-case basis, there may have been an alternative solution such as house arrest or periodic four hour visits with the child. As discussed earlier, the procedures for civilian pretrial confinement in Enclosure 5 provide critical requirements for confinement as well provide seven factors to consider before the detention of civilian personnel.

#### Limited Military Defense Counsel

Moreover, with regards to Arnt's defense, she was not provided any legal assistance until at least forty hours after her detainment.<sup>171</sup> For such a heinous crime, this seems like an extremely long duration. As a result, Arnt signed a waiver limiting her

official defense counsel to an attorney within the military. Specifically, Arnt was forced to waive her rights to full representation by acknowledging the retention of this limited military defense counsel. However, according to the DoDI the retention of military counsel is dependent upon retaining civilian defense counsel representation. From the facts, Arnt did not retain a civilian defense attorney until she reached the states. Thus, the summary of events from the AUSA office indicates that she only had counsel five hours before the initial proceeding and during the initial proceeding.<sup>172</sup> There is no indication from the facts that she had counsel from the end of the initial proceeding until she returned to the states.

As mentioned earlier, the *United States v. Robertson* case speaks very strongly of defense counsel's representation continuing through even post-trial actions and until counsel is retained.<sup>173</sup> Here, the Arnt case is in the initial stages of a felony murder case and it appears as if her limited defense counsel was only available twice – once to consult with her five hours before the initial proceeding and second, during the initial proceeding.<sup>174</sup> Thus, according to *United States v. Robertson*, it can be argued that Arnt was denied effective assistance of counsel.

Although the facts state that a Turkish attorney was hired to represent Arnt, there is no evidence of his role in defending her case.<sup>175</sup> Surprisingly, the Turkish defense attorney did not even question or speak to Arnt.<sup>176</sup> Perhaps, Arnt declined this representation but most likely his assistance was not used because of the initial plan to prosecute under United States jurisdiction.

Either way, Arnt did not have any legal representation during crucial stages of the proceedings. As a result, she waived some rights and provided a six-page statement<sup>177</sup>

admitting her guilt before receiving any legal advice. Even though, her current defense counsel will argue that the six-page statement provided to the Air Force Office of Special Investigations (AFOSI) agent and the conversation that she initiated with this individual are not admissible into evidence, this scenario of events should never have happened. In fact, if Arnt was provided immediate and effective counsel, the above events would probably have never occurred.

#### Adequate Representation

Besides limited military defense representation, there is also the issue of adequate representation. In other words, Arnt did not have a local attorney nor was this attorney physically present for any meetings with Arnt.<sup>178</sup> He was not even physically present for her initial appearance but availed himself via video teleconference from Germany.<sup>179</sup> Although Arnt signed a waiver agreeing to this limited representation,<sup>180</sup> she had no other choice.

In *Illinois v. Stroud*, the State Supreme Court ruled that a defendant's due process rights to be present for his trial proceedings were violated when the proceedings were conducted via closed circuit television.<sup>181</sup> This case could be analogous to the Arnt case in that the accused has a right to be in the physical presence of all parties to support and defend his or her case. Here, Arnt did not waive the right to be in the physical presence of defense counsel but only to the scope of her limited representation.<sup>182</sup>

Although the Confrontation Clause of the Sixth Amendment does not guarantee suspects an absolute a right to a face-to-face meeting with parties involved at a trial, the clause is sensitive to ensuring the interests of justice and furthering important public policies.<sup>183</sup> Thus, a defendant such as Arnt who is on trial for second-degree murder

committed in another country should be able to confront all parties including witnesses, prosecutors, defense attorneys, judges, and magistrates to demonstrate the crucial public policy of American's retaining their constitutional rights overseas.

#### Cost of Receiving Limited Military Defense Counsel and a Host Nation Attorney

On the other hand, the question of whether the government should provide limited military counsel or hire a local Turkish attorney for a civilian is another issue. Here, Arnt received the services of military counsel free of charge. Besides providing the military defense counsel, the government also hired a local Turkish attorney to represent Arnt in the event that Turkish officials wanted to interview her, arraign her, or take any other action.<sup>184</sup> This situation could be analogous to a civilian in the United States receiving the assistance of a public defender. In fact, as previously discussed in *Reid v. Covert*, United States citizens stationed abroad can invoke the protections of the Fifth and Sixth Amendments.<sup>185</sup> Based on these constitutional grounds, Arnt must be granted the assistance of counsel.

But here, both a military defense attorney and a Turkish attorney were hired to represent Arnt. The question is who bares the cost of such litigation for those unable to afford counsel. As the number of civilians increases overseas, this will become even more of an issue. According to *Gideon v. Wainwright*, the U.S. Supreme Court stated:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>186</sup>

As a result, protecting constitutional rights becomes even more difficult when additional host nation attorneys are hired overseas. The answers to these questions are not easily apparent. Right now, the United States government will ultimately bare a high cost for the crimes civilians commit overseas.

### Application of DoDI

Another area of analysis is the scope and applicability of the DoDI to Arnt. According to DoDI, Arnt is subject to the policies and procedures under the instruction because she is “family member” accompanying a member of the Armed Forces outside the United States. A “family member” is defined as a dependent within the instruction.<sup>187</sup> It is also defined as a person for whom a member of the Armed Forces has legal responsibility for while that person is residing outside the United States with or accompanying that member of the armed forces.<sup>188</sup>

In this case, the status of Arnt is questionable. According to the facts, she was visiting her husband in Turkey to allow him to meet his newly born daughter. Unfortunately, it is not clear if Arnt was to remain with her husband in Turkey. In fact, there is an indication that Arnt was legally separated from her husband. If this is the case, Arnt could argue that she is not a “family member.” She could also argue that she was just visiting her husband and went to Turkey as a tourist. If this were the case, the MEJA would not apply to her. This test is truly a facts and circumstances test and probably will be pursued by the defense if Arnt is categorized as a tourist vice a “family member.”

### Deposition and Subpoena of Foreign Witnesses

Besides procedural issues, this case and future cases will struggle over discovery problems such as the practicality to subpoena foreign witnesses. This is a huge obstacle for both sides. In fact, the pursuit of justice will be very difficult when foreign witnesses do not willingly cooperate or do not have the means to attend a trial in the United States. Since the United States government cannot legally force these witnesses to attend a federal criminal trial, the chances of getting a fair and speedy trial are very slim. Moreover, the United States cannot legally depose foreign witnesses so even access to foreign witnesses in the host nation may not be easy. Thus, the issue of a fair trial for Arnt in light of these obstacles poses a significant dilemma.

For instance, in the case of *People v. Arellano-Avila*, the defendant filed a motion to take the deposition of his nephew in order to defend against a charge of sexual assault and sexual assault on a child by force.<sup>189</sup> Since the nephew resided in Mexico, the district court of Colorado ordered that the nephew's deposition be taken in Mexico.<sup>190</sup> On appeal, the Colorado Supreme Court ruled that the district court lacked the authority to issue such an order and made the rule absolute.<sup>191</sup> Under Colorado Rule of Criminal Procedure 15, the district court did not have the power to order the taking of depositions outside its presence or jurisdiction.<sup>192</sup> Specifically, Colorado state law does not allow the securing of out-of-state witnesses. Its power only extends to residents of states that have enacted The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.<sup>193</sup> It does not extend to residents of foreign countries.<sup>194</sup> Since the lower court could not issue a subpoena to someone outside its jurisdiction, and a subpoena is

necessary to compel the deposition, the court lacked the authority to order the deposition.<sup>195</sup>

Here, in Arnt, the state of California will most likely subpoena witnesses. From the facts, it is not obvious if there will be a need to subpoena specific foreign witnesses. However, this is a strong possibility. Based on the above Colorado case, California will not be able to compel depositions of foreign witnesses. As a result, Arnt's Sixth Amendment right to confront witnesses against her and to obtain witnesses in her favor may not be enjoyed.<sup>196</sup> Thus, she will not be able to receive the protections guaranteed her by the U.S. Constitution and will ultimately be denied her rights. Issues such as this one are compelling, and question the enforcement of the MEJA.

In addition, the monetary and administrative costs to the government and to Arnt can also be overwhelming. In the future, balancing justice with the monetary expenses to prosecute such cases will be very difficult. Overall, the problems facing the implementation of this Act are very troublesome. As a result, the following recommendations are provided to assist in enforcement and clarification of the MEJA.

#### Recommendations to Assist in Closing Gaps Under the MEJA

##### Assistant United States Attorneys Assigned by DoJ

One recommendation to assist in closing the gap under the MEJA is for the Department of Justice to issue instructions assigning AUSAs appropriately. In fact, an Assistant United States Attorney should be designated for each United States District to handle such cases. These AUSAs should be available to the United States Judge Advocates assigned to combatant commands to provide assistance for possible prosecution of civilians accompanying Armed Forces.

Ultimately, the accessibility of these AUSAs will help with the initial proceedings of suspects. Specifically, the accountability of AUSAs to specific districts will help alleviate any problems with suspects receiving the full protection of their constitutional rights overseas. For instance, the suspect can enjoy the right to a speedy and public trial where the crime was committed.<sup>197</sup> Moreover, the accused will have a better chance of confronting and obtaining foreign witnesses in his or her favor. In the end, the assignment and accountability of AUSAs to specific districts will better service the interests of justice and expedite the process overseas. However, the overall responsibility for the assignment of AUSAs should fall under the DoJ. The DoJ will need to issue instructions specifying the duties and responsibilities of these AUSAs to handle these unique cases.

#### Public Defenders Assigned by DoJ

In addition to the assignment of AUSAs by the DoJ, there should also be public defenders available. In this way, a civilian suspect has access to counsel immediately. These public defenders can also be available and assigned by the DoJ to provide legal assistance to those accompanying Armed Forces overseas. Once again, this will allow suspects to obtain the assistance of counsel according to the Sixth Amendment.<sup>198</sup>

#### Designation of Federal Magistrates by DoJ

Moreover, federal magistrates should also be assigned by DoJ to ease the process of conducting telephone and video teleconferencing interviews with all parties involved. For example, the DoJ will assign a federal magistrate for each United States District to help prosecute crimes committed under the MEJA. Designating federal magistrates to these districts will allow the suspect to receive a probable cause hearing immediately as well as avoid potential Sixth Amendment issues.

Besides clarifying provisions within the MEJA, appropriate adjustments should also be made to the DoDI. As mentioned the following enclosures will help provide guidance and resolve gaps within the DoDI. These enclosures include: Definition Enclosure E2, The Principles and Guidelines Enclosure E3, Procedures for Civilian Pretrial Confinement Enclosure E5, United States Federal Magistrates Enclosure E6, Revision to 28 U.S.C. § 631 E7, Revisions to Department of Defense Instruction E8, and Form Additions to Department of Defense Instruction E9. Each enclosure is self-explanatory and should be included in its entirety

## E2. ENCLOSURE 2

### DEFINITIONS

E2. Arrest and Commitment – To be taken into physical custody by law enforcement officials and delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to the committed conduct.<sup>199</sup>

E2. Cadet(s)- A cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.<sup>200</sup>

E2. Command Sponsorship Family Member – Family member residing with the service member at a location outside the continental United States, where the sponsor is authorized to serve the accompanied tour in an area that has an accompanied tour prescribed and family members are authorized by appropriate authority to be at sponsor's duty assignment.<sup>201</sup>

E2. Custody – Restraint that is imposed by apprehension and that may be but is not necessarily, physical.<sup>202</sup>

E2. Felony - A crime sufficiently serious to be punishable by death or a term in state or federal prison, as distinguished from a misdemeanor which is only punishable by confinement to county or local jail and/or a fine. A crime carrying a minimum term of one-year or more in federal prison.

E2. Host Nation - A NATO nation that receives the forces and/or supplies of allied nations and/or NATO organizations to be located on, or to operate in, or to transit through its territory.<sup>203</sup>

E2. Inactive Duty Training- (a) Duty prescribed for Reserves by the Secretary concerned under section 206 of Title 37 or any other provision of law; and (b) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.<sup>204</sup>

E2. Initial Proceeding – An initial appearance before a judge or a detention hearing intended to meet the requirements of the Federal Rules of Criminal Procedure.<sup>205</sup>

E2. Last Known Residence – A location within the United States where the accused lived or resided.<sup>206</sup>

E2. Legal Domicile – A location within the United States where the accused claimed as his or her legal state of residence.<sup>207</sup>

E2. Legal Separation – A legal separation is a finding by a court that the conditions or circumstances of a marriage make it intolerable for the parties to live together but that the marriage itself should be maintained.<sup>208</sup>

E2. Limited Representation- Military counsel available for the purpose of providing basic or restricted representation at initial proceedings as required by the MEJA.<sup>209</sup>

E2. Probable Cause – Facts and circumstances which cause a reasonable person to conclude in a criminal case that an individual accused of a crime committed it, and in a civil case that a cause of action does exist. It is also the standard required for issuance of a search warrant.<sup>210</sup>

E2. Reside – To remain or stay, to dwell permanently or continuously, to have a settled abode for a time.<sup>211</sup>

E2. Serious Misconduct – Includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States.<sup>212</sup>

E2. “Within the Special Maritime and Territorial Jurisdiction of the United States”- In general, any place outside the jurisdiction of the United States with respect to an offense by or against a national of the United States.<sup>213</sup>

### E3. ENCLOSURE 3

#### PRINCIPLES AND GUIDELINES

E3.6.1. Substantial or serious frauds against the Government or significant attempted or actual theft, damage, or destruction of Government property;

E3.6.2. Death or serious injury to, attempted injury or threatened injury to, or sexual assault of a national of the U.S., or any other person employed by or accompanying the Armed Forces outside the U.S., as defined in enclosure 2; or

E3.6.3. Conduct that affected adversely or threatened to affect adversely the readiness, morale, discipline, or health of the Armed Forces or its members.<sup>214</sup>

E3.6.4. Example:

Article 134, Misprison of a serious offense – any offense punishable under the authority of the code by death or by confinement for a term exceeding one year.<sup>215</sup>

Title 22 – A felony under Federal, state or local law punishable by a term of imprisonment of more than one-year.<sup>216</sup>

## E5. ENCLOSURE 5

### PROCEDURES FOR CIVILIAN PRETRIAL CONFINEMENT

- (a) *In general.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

#### *Discussion*

Civilian male and female detainees shall be detained separately.

- (b) *Who may be confined.* Any person who is subject to the MEJA may be confined if the requirements of this rule are met.
- (c) *Who may order confinement.* A federal magistrate or a military judge may order confinement.
- (d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:
- i. An offense triable by the MEJA has been committed;
  - ii. The person confined committed it; and
  - iii. Confinement is required by the circumstances.
- (e) *Advice to the accused upon confinement.* Each person confined shall be promptly informed of:
- i. The nature of the offenses for which held;
  - ii. The right to remain silent and that any statement made by the person may be used against the person;
  - iii. The right to retain civilian counsel at no expense to the United States, and the right to request assignment of limited military counsel; and
  - iv. The procedures by which pretrial confinement will be reviewed.
- (f) *Military counsel.* If requested by the accused and such request is made known to military authorities, limited military counsel shall be provided to the accused before the initial review under subsection (i) of this rule or within 48 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may only be assigned for the limited purpose of representing the accused during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the accused shall be so informed and shall sign a waiver acknowledging such rights. Unless otherwise provided by regulations of the Secretary concerned, an accused does not have a right under this rule to have military counsel of the accused's own selection.

(g) *Who may direct release from confinement.* Any commander of a U.S. citizen on a military installation, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) and/or (j) of this rule, or, once charges have been referred, a federal magistrate detailed to the court to which the charges against the accused have been referred or a military judge, may direct release from pretrial confinement. For purposes of this subsection, “any commander” includes the immediate or higher commander of the accused and the commander of the installation on which the confinement facility is located.

(h) *Notification and action by federal magistrate.*

i. *Report.* Unless the commander of the accused ordered the pretrial confinement, the law enforcement official into whose charge the accused was committed shall, as soon as practicable, cause a report to be delivered to the commander that shall contain the name of the accused, the offenses charged against the accused, and the name of the person who ordered or authorized confinement.

ii. *Action by federal magistrate.*

1. *Decision.* Not later than 48 hours after the commander’s ordering of an accused into pretrial confinement or, after receipt of a report that a member of the commander’s unit or organization has been confined, whichever situation is applicable, the federal magistrate shall decide whether pretrial confinement will continue. A federal magistrate’s compliance with this subsection must also satisfy the 48 hour probable cause determination of subsection (i)(1) below, provided the federal magistrate is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control.

2. *Requirements of confinement.* The federal magistrate shall direct the accused’s release from pretrial confinement unless the federal magistrate believes upon probable cause, that is, upon reasonable grounds, that

- i. An offense triable by a U.S. district court has been committed;
- ii. The accused committed it; and
- iii. Confinement is necessary because it is foreseeable that:
- iv. The accused will flee the country and not appear at trial, pretrial hearing, or investigation, or

- v. The accused will engage in serious criminal misconduct; and
- vi. Less severe forms of restraint are inadequate.

#### *Discussion*

A civilian should not be confined as a mere matter of convenience or expedience. Some of the factors that should be considered under this subsection are:

- (1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
- (2) The weight of the evidence against the accused;
- (3) The accused's ties to the local country, including family, employment history, financial resources, and length of residency;
- (4) The accused's character and mental condition;
- (5) The accused's civilian employment record, including any record of previous misconduct;
- (6) The accused's record of appearance at or flight from other pretrial investigations, trials, and other similar court proceedings; and
- (7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus, the federal magistrate should consider whether the accused could be safely returned to the accused's place of employment, at liberty, under arrest, or conditions on liberty.

- 3. *48-hour memorandum.* If continued pretrial confinement is approved, the federal magistrate shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded through the DoJ or senior attorney to the AUSA under subsection (i)(2) of this rule. If such a memorandum was prepared by the federal magistrate before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement.*

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached federal magistrate within 48 hours of imposition of confinement under military control. If the accused is apprehended by host nation authorities or U.S. civilian authorities and remains in host nation custody at the request of foreign authorities, reasonable efforts will be made to bring the accused under U.S. control if international agreements allow such actions.

(2) *10-day review of pretrial confinement.* Within 10 days of the imposition of confinement, a neutral and detached federal magistrate appointed in accordance with regulations prescribed by the Department of Justice shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under U.S. military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 10-day review:*

- i. *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the accused's federal magistrate. Additional written matters may be considered, including any submitted by the accused. The accused and the accused's counsel if any, shall be allowed to appear before the 10-day reviewing federal magistrate and make a statement if practicable. A representative of the overseas command may also appear before the reviewing federal magistrate to make a statement.

(B) *Extension of time limit.* The 10-day reviewing federal magistrate may, for good cause, extend the time for completion of the review to 14 days after the imposition of pretrial confinement.

(C) *Action by 10-day reviewing federal magistrate.* Upon completion of review, the reviewing federal magistrate shall approve continued confinement or order immediate release.

(D) *Memorandum.* The 10-day reviewing federal magistrate's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the 10-day reviewing federal magistrate shall be maintained in accordance with regulations prescribed by the Department of Justice and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The 10-day reviewing federal magistrate shall upon request and after notice to the parties, reconsider the decision to confine the accused based upon any significant information not previously considered.

(j) *Review by federal magistrate.*

Once the charges for which the accused has been confined are referred to trial, the federal magistrate shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The federal magistrate judge shall order release from pretrial confinement only if:

- a. The 10-day reviewing federal magistrate judge's decision was an abuse of discretion, and there is not sufficient information presented to the original federal magistrate judge justifying continuation of pretrial confinement under this rule;
- b. Information not presented to the 10-day reviewing federal magistrate judge establishes that the accused should be released under this rule;
- c. The provisions of this rule have not been complied with and information presented to the federal magistrate judge does not establish sufficient grounds for continued confinement under this rule.

(2) *Credit.* The federal magistrate shall order administrative credit under this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of this rule.

k. *Remedy.*

The remedy for noncompliance with (f), (h), (i) or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1-

day credit for each day of confinement served as a result of such noncompliance. The federal magistrate may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied to reduce any court fees or bail paid by the accused.

l. *Confinement after release.*

No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

m. *Exceptions.*

(1) Operational necessity.

The Department of Defense and the Department of Justice may suspend applications of certain subsections of this rule where operational requirements and national security necessitate such a delay.<sup>217</sup>

## E6. ENCLOSURE 6

### UNITED STATES FEDERAL MAGISTRATES

#### Section I

##### 6.1. Scope

A U.S. magistrate judge is a judicial officer of the district court and is appointed by majority vote of the active district judges of the court to exercise jurisdiction over matters assigned by statute as well as those delegated by the district judges.

*a.* This enclosure establishes the Federal Magistrate Program. It authorizes and specifies procedures for the appointment and assignment of federal magistrates and for their use to review civilian pretrial confinement. It implements the Federal Rules of Evidence, by authorizing federal magistrates to issue necessary search and seizure, and apprehension authorizations on probable cause.

*b.* There is no relationship between the Military Magistrate Program and the Department of the Army's implementation of the Federal Magistrate System to dispose judicially of uniform violation notices and minor offenses committed on military installations.

*c.* The Federal Magistrate Program is a Department of Justice program for review of pretrial confinement and the issuance of search, seizure, and apprehension authorizations, on probable cause, by neutral and detached magistrates.

*d.* A federal magistrate is empowered to direct the release of persons from pretrial confinement, or to recommend release from confinement pending final disposition of foreign criminal charges, on a determination that continued confinement does not meet legal requirements, and to issue search, seizure, and apprehension authorizations on probable cause.

##### 6.2. Appointment of federal magistrates

*a. Assigned federal magistrates.* Assigned federal magistrates will be appointed by majority vote of the active district judges of the court to exercise jurisdiction over matters assigned by statute as well as those delegated by the district judges. They are selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate [magistrate judge] positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.

*b. Part-time federal magistrates.* Part-time federal magistrates will be appointed by majority vote of the active district judges of the court to exercise jurisdiction over matters assigned by statute as well as those delegated by the district judges.

(1) DoJ may nominate one or more magistrates for appointment as part-time federal magistrates.

(2) Nominees will not be engaged in criminal investigation or the prosecuting function and will possess the requisite training, experience, and maturity to perform the duties of a magistrate.

(3) Nominations will be forwarded to the appropriate designee of DoJ. The designee will forward the names of appointed part-time federal magistrates to the Attorney General.

### 6-3. Powers of military magistrates

*a. Review of confinement.*

(1) Assigned federal magistrates will be given responsibility for reviewing pretrial confinement in any confinement facility as DoJ will direct.

(2) Part-time federal magistrates will be given responsibility for reviewing pretrial confinement as determined by the supervising federal judge.

*b. Issuance of search, seizure, and apprehension authorizations.*

Any federal magistrate, whether assigned or part-time, is authorized to issue search and seizure and search and apprehension authorizations on probable cause under section III of this chapter.

*c. Review of confinement pending outcome of foreign criminal charges.*

Federal magistrates, whether assigned or part-time, are authorized to review confinement of civilians, in U.S. facilities, pending final disposition, including appeals, of foreign criminal charges). (Final disposition of foreign criminal charges incorporates all stages of the host country's criminal proceedings, including appeals, up to commencement of any sentence to confinement resulting from conviction on the foreign criminal charges.)

### 6-4. Supervision of federal magistrates

*a. The Attorney General, Department of Justice.* The Attorney General is responsible for the general administration of the Federal Magistrate Program. These responsibilities include--

(1) Making recommendations to the Judicial Conference on the appointment of federal magistrates and other aspects of the program.

(2) Establishing programs for training assigned and part-time federal magistrates.

(3) Recommending districts at which assigned federal magistrates will be located.

- (4) Assignment of responsibility for servicing particular confinement facilities.
- (5) Designating supervising federal judges.
- (6) Monitoring rating schemes for federal magistrates.
- (7) Designating raters and senior raters for federal magistrates.

*b. Supervising federal judge.* The supervising federal judge will be responsible for the direct supervision of federal magistrates, assigned or part-time, in the performance of magisterial duties.

## Section II

### Pretrial Confinement

#### 6-5. Review by federal magistrate

*a. General.*

(1) All federal magistrates, whether assigned or part-time, are empowered to order the release from pretrial confinement of any confinee in any military confinement facility overseas on determination (following review of the case) that continued pretrial confinement does not satisfy legal requirements. The federal magistrate will consider all relevant facts and circumstances surrounding each case of pretrial confinement in arriving at this decision. Federal magistrates will review each case of pretrial confinement according to the procedures and criteria contained in the Federal Rules of Criminal Procedure and this paragraph.

(2) Part-time federal magistrates will be appointed to review pretrial confinement in all cases at confinement facilities not normally served by assigned federal magistrates. Whoever initially authorizes pretrial confinement in a facility not administered by the DoD will immediately notify the Commanding Officer exercising GCM jurisdiction over the person confined. This officer will immediately cause the responsible military magistrate to be notified of the case.

(3) Unless a federal magistrate has conducted a pretrial confinement review pursuant to paragraph 9-5b, the review of pretrial confinement of an American citizen of the U.S. will be governed by the federal magistrate regulations of the Department of Justice district that has jurisdiction over the place of confinement. American citizens ordered into pretrial confinement will be confined in DoD confinement facilities whenever practicable overseas.

(4) American citizens accompanying armed forces overseas ordered into pretrial confinement in a DoD confinement facility will be subject to the provisions of this section, unless specific exceptions to these provisions, consistent with the Federal Rules of Criminal Procedure, are requested in writing by a supervising federal magistrate.

*b. Procedures.*

(1) The federal magistrate will review pretrial confinement in accordance with the Federal Rules of Criminal Procedure. The federal magistrate's decision to approve pretrial confinement is subject to a request for reconsideration under the provisions of

this paragraph. Once charges for which the accused has been confined are referred, the accused may seek review of the propriety of pretrial confinement in accordance with the Federal Rules of Criminal Procedure. Nothing in this paragraph will preclude an accused from seeking extraordinary relief. A copy of the magistrate's memorandum to approve or disapprove pretrial confinement, required by the Federal Rules of Criminal Procedure, will be served on the supervising federal magistrate or his/her designee and, upon request, to the accused or the accused's defense counsel. Upon order of the magistrate, an accused will be released immediately from pretrial confinement in accordance with the Federal Rules of Criminal Procedure.

(2) The commander of the civilian confined, on ordering confinement or receiving notification of confinement, will provide the federal magistrate with a completed DoD form indicating a statement of the basis for the decision to confine.

(3) Federal magistrates may not impose conditions on release from confinement, but may recommend appropriate conditions to the unit commander.

(4) The unit commander concerned may impose any authorized pretrial restraint deemed necessary on a person who has been released from confinement by a magistrate. However, the unit commander may not order the return of that person to pretrial confinement except when an additional offense is committed or on receipt of newly discovered information. The federal magistrate will be immediately notified of any reconfinement and the reasons therefore.

(5) Circumstances of when citizens who, after release by a federal magistrate, are reconfined will be reviewed by the supervising federal magistrate. The determination of whether continued pretrial confinement is warranted will be made on the same legal basis as the review and determination for initial pretrial confinement.

(6) The federal magistrate will communicate the decision in each case to the citizen confined or the citizen's defense counsel. This may be accomplished by means of a copy of the written record of decision.

(7) Copies of the DoD form as completed by the commander and the magistrate's memorandum approving or disapproving pretrial confinement will be included in the Record of Trial.

#### 6-6. Administrative and logistical support

The provisions of paragraph 6-7 of this regulation pertaining to members of the U.S. Federal Magistrate Program are also applicable to assigned federal magistrates.

Section III  
Search, Seizure, and Apprehension Authorizations  
6-7. Authority of federal magistrates to issue authorizations

The following are authorized to issue search and seizure and search and apprehension authorizations on probable cause with respect to persons and property specified in the Federal Rules of Criminal Procedure:

- a. Federal magistrates assigned or attached to the Department of Justice.
- b. Part-time federal magistrates appointed under paragraph 6-2b of this regulation.

6-8. Issuance

a. The procedures for issuing of search and seizure and search and apprehension authorizations are contained in the Federal Rules of Criminal Procedure. Authorizations to search and seize or search and apprehend may be issued on the basis of a written or oral statement, electronic message, or other appropriate means of communication. Information provided in support of the request for authorization may be sworn or unsworn. The fact that sworn information is generally more credible and often entitled to greater weight than information not given under oath should be considered.

b. An affidavit supporting a request for authorization to search and seize or apprehend may be used if the supporting information is to be sworn. Authorizations to search and seize or search and apprehend may be issued orally or in writing.

6-9 Execution and disposition of authorizations and other related papers

a. *Execution.* The Federal Rules of Criminal Procedure govern the execution of authorizations to search and seize. In addition to those requirements, the authorization should be executed within 10 days after the date of issue. An inventory of the property seized will be made at the time of the seizure or as soon as practicable. A copy of the inventory will be delivered to the person from whose possession or premises the property was taken.

b. *Disposition of authorization and other papers.* After the authorization has been executed, the authorization and a copy of the inventory will be returned to the issuing authority. Thereafter, all documents and papers relative to the search or seizure will be transmitted to the appropriate law enforcement office. They will be filed for use in any future litigation or proceeding on the results of such a search.

6-10. Recovery and disposition of property

a. *Evidence retained for trial.* Evidence retained for trial will be disposed of according to applicable regulations. Federal magistrates will make every effort to return property, when appropriate, as expediently as possible by substituting photographic or written descriptions when such measures will not jeopardize pending prosecutions.

#### 6-11. Reapplication

Any person requesting authorization to search and seize must disclose to the issuing authority any knowledge that person has of denial of any previous request for a search and seizure authorization involving the same individual and the same property.

#### 6-12. Legality of searches and seizures

The requirements set forth in this chapter are administrative only and the failure to comply does not, in and of itself, render the search or seizure unlawful within the meaning of the Federal Rules of Procedure.<sup>218</sup>

## E7. ENCLOSURE 7

### REVISION OF 28 U.S.C. § 631

#### § 631. Appointment and tenure

(a) The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine under this chapter 28 U.S.C. § 631. In the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, 28 U.S.C. § 631 shall apply as though the court appointing such a magistrate judge were a United States district court. In addition, a magistrate judge shall be designated for each Combatant Commander of the United States Armed Forces. These magistrate judges shall be available to United States Judge Advocates overseas to provide assistance for possible prosecution of civilians accompanying Armed Forces. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where the conference deems it desirable, a magistrate [magistrate judge] may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made by the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate [magistrate judge] in the adjoining district or districts.

#### § 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate [magistrate judge] serving under this chapter 28 U.S.C. § 636 shall have within the territorial jurisdiction prescribed by his appointment--

- (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
- (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;
- (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
- (4) the power to enter a sentence for a petty offense;
- (5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented; and
- (6) the power to conduct the initial appearance of persons under the Federal Rules of Criminal Procedure pursuant to section 3265 of title 18 concerning the initial probable cause determinations.<sup>219</sup>

## E8. ENCLOSURE 8

### REVISIONS TO DEPARTMENT OF DEFENSE INSTRUCTION

#### 6.2.4. Arrest:

- 6.2.4.4.1 Law enforcement personnel must also receive authorization from the Secretary of Defense as well as refer to the appropriate international agreement or SOFA before delivering suspects to appropriate foreign authorities.

#### 6.4. Initial Proceedings:

- 6.4.3 Initial proceedings required by the Act and this Instruction shall be conducted without delay. In accordance with the U.S. Supreme Court decision in County of Riverside v. McLaughlin (reference (q)) the initial appearance shall be conducted within 48 hours of the arrest. If the initial appearance cannot be conducted within 48 hours, then the probable cause determination should be afforded some flexibility in accordance with the U.S. Supreme Court decision in Gerstein v. Pugh (reference (r)).<sup>220</sup>

E9. ENCLOSURE 9

FORM ADDITIONS TO DEPARTMENT OF DEFENSE INSTRUCTION

Request for Public Defender By Showing of Financial Hardship:

\_\_\_\_\_, a U.S. Federal Public Defender, having been requested by the above-named Defendant (*or* assigned by the Court) to provide legal services, hereby enters \_\_\_\_\_[his *or* her] appearance as counsel for Defendant in the above-styled cause.

Said counsel represents that the Department of Justice's Office has investigated the Defendant's ability to employ private counsel and has found the Defendant to be indigent.

The Department of Justice's Office will provide to the Court at any time the Court requests its financial investigation conducted of the Defendant.

Respectfully submitted,  
(*Signature, Department of Justice attorney registration number, office, and P.O. address of attorney for defendant.*)<sup>221</sup>

E10. ENCLOSURE 10

REVISION OF 18 U.S.C. § 3265(b)(5)

§ 3264. Limitation on removal

(b) The limitation in subsection (a) does not apply if –

(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, in which case the person shall be removed to the nearest United States military installation outside the United States or inside the United States or one of its territories in order to adequately detain the person and to facilitate the initial appearance described in section 3265(a).<sup>222</sup>

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<sup>1</sup> Andrew Fallon and Captain Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F.L. REV. 271, 274 (2001).

<sup>2</sup> *Id.* at 271.

<sup>3</sup> *Id.* at 273.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 274.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 18 U.S.C. § 3265 (2003).

<sup>16</sup> Andrew Fallon and Captain Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F.L. REV. 271, 274 (2001).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 275.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 276.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 277.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 278.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 279.

<sup>41</sup> *Id.* at 278.

<sup>42</sup> FED. R. CRIM. P. 5.

<sup>43</sup> *Id.* at 279.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Extraterritorial Federal Criminal Jurisdiction at 1.

<sup>50</sup> *Id.* at 27.

<sup>51</sup> *Id.* at 30.

<sup>52</sup> *Id.* at 31.

<sup>53</sup> 22 U.S.C. § 4303(b) (2003).

<sup>54</sup> UCMJ art. [134](2003).

<sup>55</sup> 22 U.S.C. § 4303(b) (2003).

<sup>56</sup> Extraterritorial Federal Criminal Jurisdiction at 30.

<sup>57</sup> Extraterritorial Federal Criminal Jurisdiction at 7.

<sup>58</sup> *Id.* at 27.

<sup>59</sup> *Id.*

<sup>60</sup> 18 U.S.C. § 3267(2)(A) (2003).

<sup>61</sup> Extraterritorial Federal Criminal Jurisdiction at 26.

<sup>62</sup> U.S. DEP'T OF ARMY, REG. 608-99, PERSONAL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY page 36 (29 October 2003).

<sup>63</sup> *Id.*

<sup>64</sup> Extraterritorial Federal Criminal Jurisdiction at 8.

<sup>65</sup> *Id.* at 28.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* at 28.

<sup>68</sup> 18 U.S.C. § 3262 (2003).

<sup>69</sup> 18 U.S.C. § 7 (2003).

<sup>70</sup> 18 U.S.C. § 7 (2003).

<sup>71</sup> *Id.* at 26.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> MEJA Prosecution by AUSA, Central District of California, United States v. Arnt page 2 (May 29, 2003) (unpublished summary, on file with the AUSA of Central District of California provided by Robert Reed, Department of Justice) [hereinafter MEJA Summary].

<sup>77</sup> U.S. CONST. amend. VI.

<sup>78</sup> Verosol v. Liken Home Furnishing, 1981 D.N.J., 1 (1981).

<sup>79</sup> *Id.* at 2.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 6.

<sup>83</sup> Extraterritorial Federal Criminal Jurisdiction at 13.

<sup>84</sup> *Id.*

<sup>85</sup> U.S. CONST. amend. IV.

- <sup>86</sup> Extraterritorial Federal Criminal Jurisdiction at 14.
- <sup>87</sup> United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).
- <sup>88</sup> *Id.*
- <sup>89</sup> *Id.*
- <sup>90</sup> *Id.*
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.* at 263.
- <sup>93</sup> *Id.* at 262.
- <sup>94</sup> *Id.*
- <sup>95</sup> *Id.* at 263.
- <sup>96</sup> *Id.* at 270.
- <sup>97</sup> *Id.*
- <sup>98</sup> U.S. CONST. amend. IV.
- <sup>99</sup> *Id.* at 270.
- <sup>100</sup> Extraterritorial Federal Criminal Jurisdiction at 13.
- <sup>101</sup> *Id.* at 14.
- <sup>102</sup> *Id.* at 14.
- <sup>103</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).
- <sup>104</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).
- <sup>105</sup> *Id.*
- <sup>106</sup> *Id.*
- <sup>107</sup> *Id.*
- <sup>108</sup> U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE page 48 (29 September 2002).
- <sup>109</sup> 28 U.S.C. § 636 (2004).

<sup>110</sup> Extraterritorial Federal Criminal Jurisdiction at 19.

<sup>111</sup> *Id.* at 33.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> United States v. Robertson, 34 M.J. 1206, 1211 (A.F.C.M.R.1992).

<sup>115</sup> *Id.* at 1211

<sup>116</sup> *Id.* at 1212

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> United States v. Palenius, 2 M.J. 86, 93 (A.F.C.M.R.1977).

<sup>121</sup> U.S. CONST. Amend. VI.

<sup>122</sup> Strickland v. United States, 466 U.S. 668, 687 (1984).

<sup>123</sup> *Id.*

<sup>124</sup> Illinois v. Stroud, 208 Ill. 2d 398, 399 (2004).

<sup>125</sup> *Id.* at 5.

<sup>126</sup> *Id.* at 25.

<sup>127</sup> United States v. Burke, 345 F.3d 416, 417 (6th Cir. 2003).

<sup>128</sup> *Id.* at 417.

<sup>129</sup> *Id.* at 416.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Extraterritorial Federal Criminal Jurisdiction at 20.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 21.

<sup>137</sup> *Id.* at 126.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 119.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 123.

<sup>144</sup> Extraterritorial Federal Criminal Jurisdiction at 21.

<sup>145</sup> *Id.*

<sup>146</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).

<sup>147</sup> *Id.*

<sup>148</sup> MEJA Summary at 2.

<sup>149</sup> *Id.* Jason Ziokowski then sent law enforcement officers and an ambulance to the Arnt residence. Prior to the stabbing, on the evening of May 26<sup>th</sup> 2003, Technical Sergeant Aretha Barnes and her husband, Technical Sergeant George Barnes went to a barbecue at the residence of Staff Sergeant Darrell Simpson, on Incirlik Air Base. Staff Sergeant Arnt had also been present at the Simpson residence. Between 1100 and 1130 hours, Staff Sergeant Arnt left the Simpson residence and returned home. Soon after, Latasha Arnt called Technical Sergeant Aretha Barnes at the Simpson residence and asked her to pick her husband up because he was acting loud and drunk. Technical Sergeant Aretha Barnes, her husband, and the Simpsons went to the Arnt residence. When they arrived at the Arnt home, Latasha Arnt was on the telephone with the law enforcement desk and her husband was on the kitchen floor with a stab wound to his chest.

<sup>150</sup> *Id.* According to the facts, a military magistrate from Incirlik Air Force Base made a probable cause determination that Arnt committed the stabbing of her husband. In fact, this magistrate ordered the detention and custody of Arnt after receiving the

investigation report from Air Force Security officials. Following her detention, she was officially charged with a violation of the MEJA during the initial hearing.

<sup>151</sup> *Id.* at 3.

<sup>152</sup> *Id.* at 2.

<sup>153</sup> *Id.* The SJA was familiar with the MEJA and realized the possibility of this case being pursued under it. Because the DoD regulations were still pending, he sought guidance through Headquarters United States Air Force Europe/Judge Advocate (HQ USAFE/JA) and Air Force Legal Services Assistance/Judge Advocate J M (AFLSA/JAJM).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* According to North Atlantic Treaty Organization (NATO) SOFA provisions, if both the United States and Turkey have concurrent jurisdiction, the sending state has primary jurisdiction over a citizen of their own state. In this case, all relevant parties agreed that the MEJA should be applied. Following this decision, an AUSA from Riverside, California was identified and assumed responsibility for the case.

<sup>156</sup> *Id.* Prior to the initial proceedings, the local public Turkish attorney was briefed on the plan to use the MEJA. The Turkish prosecutor was satisfied with how Arnt's case was being handled and verbally waived jurisdiction.<sup>156</sup> The United States prosecutor stated that a formal written waiver of the case would be forwarded to the appropriate United States military authorities. However, this formal waiver would take one to three months to deliver. As a substitute, the Turkish military attorney in the SJA's office prepared a Memorandum For Record of the verbal waiver. This Memorandum was faxed to the AUSA office in Riverside, California. This Memorandum is evidence that Turkish officials will not and have not prosecuted Arnt for this offense. This Memorandum is essential because it allows the MEJA to apply to Arnt's case. Otherwise, the United States would not be able to proceed with jurisdiction because § 3261(b) of the MEJA prevents a citizen from being tried by two different sovereigns.

<sup>157</sup> *Id.* This delay occurred because there was a communication breakdown between the SJA and the Air Force Office of Special Investigation (AFOSI) case agent. Here, the affidavit of the facts and circumstances was not ready to be presented at the scheduled hearing. As a result, the meeting was delayed two hours so that the AFOSI agents in Incirlik, Turkey and the AFOSI special agent liaison to the AUSA in Riverside, California could prepare the affidavit.

<sup>158</sup> *Id.* The AUSA provided Federal Magistrate Judge Stephen Larson with the MEJA. Five hours before the scheduling hearing, Arnt spoke telephonically with her military defense counsel stationed in Germany. Arnt signed a waiver agreeing to this limited representation. As a result, the initial hearing over a telephone conference call was initiated from Incirlik Air Base at 1000 hours on 28 May 2003. The following

individuals participated in the conference call; the Federal Magistrate Judge, the AUSAs assigned to the case from Riverside, California, Arnt, Arnt's military defense counsel and the SJA at Incirlik, Air Force Base. At the beginning of the hearing, the Federal Magistrate Judge explained the proceedings to all parties. Arnt and her military defense counsel did not challenge the detention during the hearing. They elected to challenge her detention when she was returned to the United States.

<sup>159</sup> *Id.* As for Arnt's transportation to the United States, she was scheduled to leave Turkey on Saturday, 31 May with U.S. Marshal officials and arrive in the United States on 1 June. Mr. Depue informed the AUSAs that an indictment needed to be filed so that the Central District of California would have venue when Arnt arrived in the United States. The timing of this indictment was significant since it determined the venue.

<sup>160</sup> *Id.* Some additional information that occurred prior to the initial proceedings include the six-page statement that Arnt provided to the AFOSI agent. In fact, Arnt initiated a conversation with an AFOSI agent and provided him with a six-page statement stating that she acted in self-defense when her husband threatened her and assaulted her. This statement has been faxed to the AUSAs in Riverside, California.

Some other miscellaneous facts regarding the case include the custody of the child and the return of personal effects. During detention, Arnt executed a power of attorney authorizing a member of her husband's unit to escort, her daughter, Ashton, to the United States. The child was delivered to Arnt's mother, who has been authorized to serve as an interim caregiver. Arnt has the option of changing these arrangements if she decides to do so. Ashton did not travel on the same plane as Arnt. While detained, Arnt had supervised visits with her daughter. She also had the option to contact her military defense counsel whenever desired.

<sup>161</sup> Extraterritorial Federal Criminal Jurisdiction at 14.

<sup>162</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 275.

<sup>166</sup> *Id.*

<sup>167</sup> *Reid v. Covert*, 354 U.S. 1, 4 (1957).

<sup>168</sup> Extraterritorial Federal Criminal Jurisdiction at 14.

<sup>169</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).

<sup>170</sup> *Id.*

<sup>171</sup> MEJA Summary at 1.

<sup>172</sup> *Id.*

<sup>173</sup> United States v. Robertson, 34 M.J. 1206, 1211 (A.F.C.M.R.1992).

<sup>174</sup> MEJA Summary at 2.

<sup>175</sup> *Id.* at 1.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 3.

<sup>178</sup> *Id.* at 2.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Illinois v. Stroud, 208 Ill. 2d 398, 399 (2004).

<sup>182</sup> MEJA Summary at 1.

<sup>183</sup> United States v. Burke, 345 F.3d 416, 417 (2003).

<sup>184</sup> MEJA Summary at 1.

<sup>185</sup> Reid v. Covert, 354 U.S. 1, 4 (1957).

<sup>186</sup> Gideon v. Wainwright, 371 U.S. 335, 344 (1963).

<sup>187</sup> Extraterritorial Federal Criminal Jurisdiction at 27.

<sup>188</sup> *Id.*

<sup>189</sup> People v. Arellano-Avila, 20 P.3d 1191, 1191 (Colo. 2001).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

- <sup>195</sup> *Id.*
- <sup>196</sup> U.S. CONST. amend. IV.
- <sup>197</sup> U.S. CONST. amend. IV.
- <sup>198</sup> U.S. CONST. amend. IV.
- <sup>199</sup> Extraterritorial Federal Criminal Jurisdiction at 26.
- <sup>200</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [103](2003).
- <sup>201</sup> U.S. DEP'T OF NAVY, INSTR. [1300.1R] COMNAVFORJAPAN Instruction COMMAND SPONSORSHIP, page (28 July 2000).
- <sup>202</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).
- <sup>203</sup> NATO LOGISTICS HANDBOOK, DEFINITIONS (October 1997).
- <sup>204</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [103](2003).
- <sup>205</sup> Extraterritorial Federal Criminal Jurisdiction at 20.
- <sup>206</sup> *Id.* at 12.
- <sup>207</sup> *Id.*
- <sup>208</sup> BLACK'S LAW DICTIONARY 712 (10<sup>th</sup> ed. 2001).
- <sup>209</sup> Extraterritorial Federal Criminal Jurisdiction at 19.
- <sup>210</sup> MODERN DICTIONARY FOR THE LEGAL PROFESSION, (3<sup>rd</sup> ed. 2003).
- <sup>211</sup> BLACK'S LAW DICTIONARY 712 (10<sup>th</sup> ed. 2001).
- <sup>212</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).
- <sup>213</sup> 18 U.S.C. § 7 (2003).
- <sup>214</sup> Extraterritorial Federal Criminal Jurisdiction at 10.
- <sup>215</sup> UCMJ art. [134](2003).
- <sup>216</sup> 22 U.S.C. § 4303(b) (2003).
- <sup>217</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. [305](2003).

<sup>218</sup> U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE page 48 (29 September 2002).

<sup>219</sup> 28 U.S.C. § 631 (2004).

<sup>220</sup> Extraterritorial Federal Criminal Jurisdiction at 21.

<sup>221</sup> 2003 OHIO R. CRIM. P. 44.

<sup>222</sup> 18 U.S.C. § 3261 (2004).

## CHAPTER 3

### CONCLUSION

In summary, the MEJA has not resolved all jurisdictional gaps. Although the congressional intent is clear, there are still several procedural and constitutional issues that pose potential problems. Unfortunately, these issues will not become any easier with the increase in civilian contractors overseas. Moreover, with the advent of the implementation of the DoDI in May 2004, there will also be several terminology, scope, and due process concerns.

#### Revision of DoDI

First, the DoDI currently lacks specific terminology for felony offense, serious misconduct, dependent, and family member. Clarification of these terms will help those contend with the DoDI and properly execute the requirements of the MEJA. Since these terms have crucial meaning, they can change the meaning and interpretation of the statute. Second, the scope of the DoDI also needs revision as it applies to midshipmen, cadets, and merchant marine students. The applicability and scope of the DoDI are essential for determining major issues such as the legal status of Arnt. This is crucial to Arnt's case and will probably be a determining factor. It also needs to reference appropriate enclosures or instructions to delineate the specific responsibilities for the DoJ and DoD. Third, the DoDI needs to revise and address as appropriate the following areas: venue, federal arrest warrants, arresting procedures, detention and delivery procedures, limited military defense counsel, and the physical presence of counsel. Lastly, the DoDI needs to include an enclosure specifying the rules of civilian pretrial confinement in order to ensure that suspects receive the necessary due process requirements under the MEJA.

### Constitutional Questions Under MEJA as Related to *United States v. Arnt*

First, there will likely be two constitutional challenges in the course of defense against the implementation of the MEJA. The first constitutional challenge is the Sixth Amendment that raises the following issues. To begin with, Arnt will have difficulty receiving a speedy trial but this is not a showstopper considering the logistics and international dilemmas involved. Next, Arnt will not be able to have a trial where her crime was committed and therefore, will be deprived of this right. Third, Arnt may or may not have effective counsel if she was forced to sign a waiver accepting limited representation. Lastly, Arnt will not be able to confront witnesses since the United States government cannot legally depose or subpoena foreign witnesses.

Second, the Fourth Amendment also poses additional issues. For example, the Fourth Amendment raises the question of whether or not the absence of a federal arrest warrant is a violation of Arnt's rights. If so, then Arnt was denied protection under the Fourth Amendment and may be able to defeat her second-degree murder charge.

### Resolution of *United States v. Arnt*

Based on the constitutional issues and the gaps within the pending DoDI, Arnt will probably succeed in the trial court in defeating the implications of the MEJA. For instance, the deliberate absence of a federal arrest warrant coupled with violations of the Fourth and Sixth Amendments will probably determine her acquittal. However, on appeal Arnt will probably not succeed. A reviewing court is most likely to take a big picture view on the legislative history of the MEJA and its implications over the last forty years. If this case is heard by the United States Supreme Court, the Justices will look seriously at the implications of the constitutional protections overseas. They will also look at the

trend of no federal criminal jurisdiction overseas. Based on these facts, the United States District Court in Riverside, California will not be able to exercise federal jurisdiction overseas.

Moreover, with the enactment of the Patriot Act as well as the war on terrorism, time will tell if this nation is headed towards limiting and constricting the individual rights of citizens at home and abroad. With IRAQI FREEDOM currently in progress, the number of civilians accompanying Armed Forces overseas has increased opening the door to more serious misconduct and felonies committed in foreign nations. Based on current events, it is very difficult to predict how a court will rule. However, I honestly believe that Arnt will get away with murder because this is a case of first impression under this statute. Also under the foundation and basis of law, the Riverside Court does not have the jurisdiction to hear the case in the first place.

#### Resolution of Future Cases

However, the resolution of future cases may be a different story based on precedence and the use of timely instructions to enforce the Act. Over the next few years, case law and DoD instructions from all services will be available for reference. These service instructions will inform those accompanying forces overseas of the Act and its implications on civilians overseas. Thus, time is needed to resolve the initial problems of the DoDI in order to ensure future enforcement of the Act. It will also help establish a basis and foundation of law to build upon

## GLOSSARY

Affidavit – A written or printed declaration of statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Appeal – A resort to a superior court to review the decision of an inferior court or administrative agency.

Arraignment – Procedure whereby the accused is brought before the court to plead to the criminal charge against him in the indictment or information. The charge is read to him and he is asked to plead guilty or not guilty or where permitted, nolo contendere.

Arrest – To deprive a person of his liberty by legal authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand.

Assistant United States Attorney (AUSA) - The Assistant United States Attorneys serve as the nation's prosecutors under the direction of the Attorney General. There are 93 United States Attorneys stationed throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. United States Attorneys are appointed by, and serve at the discretion of, the President of the United States, with advice and consent of the United States Senate. One United States Attorney is assigned to each of the judicial districts, with the exception of Guam and the Northern Mariana Islands where a single United States Attorney serves in both districts.

Charged – An accusation of crime by complaint, indictment, or information.

Counsel – Advice and assistance given by one person to another in regard to a legal matter, proposed line of conduct, claim, or contention.

Court-martial – An ad hoc military court, convened under authority of government and the Uniform Code of Military Justice (UCMJ).

Department of Defense Instruction (DoDI) – The Department of Defense Instruction implements policies and procedures, and assigns responsibilities, under the MEJA of 2000 for exercising extraterritorial criminal jurisdiction over certain military personnel, former service members of the United States Armed Forces, and over civilians employed by or accompanying the Armed Forces outside the United States.

Deposition - The taking and recording of testimony of a witness under oath before a court reporter in a place away from the courtroom before trial. A deposition is part of permitted pretrial discovery, set up by an attorney for one of the parties to a lawsuit demanding the sworn testimony of the opposing party, a witness to an event, or an expert intended to be called at trial by the opposition. The testimony is taken down by

the court reporter, who will prepare a transcript if requested and paid for, which assists in trial preparation and can be used in trial either to contradict or refresh the memory of the witness, or be read into the record if the witness is not available.

Detained – To arrest, to check, to delay, to hinder, to hold, or keep in custody, to retard.

Detention - The act of retaining a person or property, and preventing the removal of such person or property. Arrest.

Felony -A crime sufficiently serious to be punishable by death or a term in state or federal prison, as distinguished from a misdemeanor which is only punishable by confinement to county or local jail and/or a fine. A crime carrying a minimum term of one-year or more in federal prison.

Fourth Amendment - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Government Accounting Office (GAO) - The General Accounting Office is the audit, evaluation, and investigative arm of Congress. GAO exists to support the Congress in meeting its Constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the American people. GAO examines the use of public funds, evaluates federal programs and activities, and provides analyses, options, recommendations, and other assistance to help the Congress make effective oversight, policy, and funding decisions.

Grand Jury – A jury in each county or federal court district which serves for a term of a year and is usually selected from a list of nominees offered by the judges in the county or district. The traditional 23 members may be appointed or have their names drawn from those nominated. A Grand Jury has two responsibilities 1) to hear evidence of criminal accusations in possible felonies (major crimes) presented by the District Attorney and decide whether the accused should be indicted and tried for a crime and 2) to hear evidence of potential public wrong-doing by city and county officials, including acts which may not be crimes but are imprudent, ineffective or inefficient, and make recommendations to the county and cities involved.

Halliburton - Founded in 1919, Halliburton is one of the world's largest providers of products and services to the oil and gas industries. It is a major supplier for the Department of Defense.

Host Nation -A NATO nation that receives the forces and/or supplies of allied nations and/or NATO organizations to be located on, or to operate in, or to transit through its territory.

Indictment - A charge of a felony voted by a Grand Jury based upon a proposed charge, witnesses' testimony and other evidence presented by the public prosecutor. To bring an indictment the Grand Jury will not find guilt, but only the probability that a crime was committed, that the accused person did it and that he/she should be tried. District Attorneys often only introduce key facts sufficient to show the probability, both to save time and to avoid revealing all the evidence.

Initial Proceeding - An initial appearance before a judge or a detention hearing intended to meet the requirements of the Federal Rules of Criminal Procedure.

Joint Surveillance and Target Attack Radar System (JSTARS) - The Joint Surveillance and Target Attack Radar System is a joint development project of the U.S. Air Force and Army that provides an airborne, stand-off range, surveillance and target acquisition radar, and command and control center.

Judge - An official with the authority and responsibility to preside in a court, try lawsuits and make legal rulings. Judges are almost always attorneys.

Jurisdiction - The authority given by law to a court to try cases and rule on legal matters within a particular geographic area and/or over certain types of legal cases. It is vital to determine before a lawsuit is filed which court has jurisdiction.

Kellogg Brown and Root - The Engineering and Construction Group, known as Kellogg Brown & Root, is Halliburton's fifth operating segment. It serves the energy industry by designing and building liquefied natural gas plants, refining and processing plants, production facilities and pipelines, both onshore and offshore.

Magistrate - A generic term for any judge of a court, or anyone officially performing a judge's functions. In federal courts, an official who conducts routine hearings assigned by the federal judges, including preliminary hearings in criminal cases.

Manual for Courts-Martial (MCM) - This is an executive order, issued by the President of the United States to provide detailed rules and procedures to implement the UCMJ.

Military Extraterritorial Jurisdiction Act (MEJA) - The Military Extraterritorial Jurisdiction Act of 2000 establishes federal criminal jurisdiction over whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one-year while employed by or accompanying the Armed Forces outside the United States, certain members of the Armed Forces subject to the UCMJ, and former service members.

METT-TC - METT-TC refers to factors that are fundamental to assessing and visualizing the battlefield. It encompasses mission, enemy, terrain, troops, time available, and civilians.

Misdemeanor – A lesser crime punishable by a fine and/or county jail time for up to one-year.

Pretrial Confinement - Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Probable Cause - Sufficient reason based upon known facts to believe a crime has been committed or that certain property is connected with a crime. Probable cause must exist for a law enforcement officer to make an arrest without a warrant, search without a warrant, or seize property in the belief the items were evidence of a crime.

Public Defender - An elected or appointed public official, who is an attorney regularly assigned by the courts to defend people accused of crimes who cannot afford a private attorney.

Second-Degree Murder - A non-premeditated killing, resulting from an assault in which death of the victim was a distinct possibility. Second-degree murder is different from first-degree murder, which is a premeditated, intentional killing or results from a vicious crime such as arson, rape, or armed robbery.

Sixth Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Stateless Person - A stateless person is a person who is not considered as a national by any State under the operation of its law.

Status of Forces Agreement (SOFA) – Status of Forces Agreements are not basing or access agreements. Rather, they define the legal status of U.S. personnel and property in the territory of another nation. The purpose of such an agreement is to set forth rights and responsibilities between the United States and the host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and resolving damage claims.

Subpoena - An order directed to an individual commanding him to appear in court on a certain day to testify or produce documents in a pending lawsuit.

Suspect - The one person, law enforcement officers believe most probably committed a crime being investigated. Once a person is determined to be a prime suspect, the police must be careful to give the "Miranda warnings," or take the risk that any admissions by the suspect may be excluded in trial.

Uniform Code of Military Justice (UCMJ) - The Uniform Code of Military Justice is a federal law, enacted by Congress. Its provisions are contained in the United States Code, Title 10, Chapter 47. Article 36 of the UCMJ allows the President to prescribe rules and procedures to implement the provisions of the UCMJ. The President does this via the Manual for Courts-Martial that is an executive order that contains detailed instructions for implementing military law for the United States Armed Forces.

United States Marshals – The mission of the United States Marshals Service is to protect the Federal courts and ensure the effective operation of the judicial system. Since 1789, U.S. Marshals and their Deputies have answered the call to service of the American people. From taking the census to protecting the President, the missions of the Service have changed to meet the needs of the nation. Today, the Marshals Service is responsible for providing protection for the federal judiciary, transporting federal prisoners, protecting endangered federal witnesses and managing assets seized from criminal enterprises.

Venue - The proper or most convenient location for trial of a case. Normally, the venue in a criminal case is the judicial district or county where the crime was committed. For civil cases, venue is usually the district or county which is the residence of a principal defendant, where a contract was executed or is to be performed, or where an accident took place. However, the parties may agree to a different venue for convenience. Sometimes a lawsuit is filed in a district or county which is not the proper venue, and if the defendant promptly objects, the court will order transfer of the case to the proper venue.

Warrant - An official order authorizing a specific act, such as an arrest or the search of someone's home. It is a written order directing the arrest of a party. A search warrant orders that a specific location be searched for items, which if found, can be used in court as evidence.

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